90-1909

(1)

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1990
No.

Eve White, a/k/a, Eve Cascio,

Petitioner,

vs.

State of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MINNESOTA

Randall D.B. Tigue
Attorney for Petitioner
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

Questions Presented

1. May the state, consistently with the First and Fourteenth Amendments to the United States Constitution, impose absolute criminal liability upon the producer, director, or publisher of a film, book, magazine or live stage performance, for violating a child pornography statute, regardless of Petitioner's knowledge or scienter as to the minority of the performer involved?

2. May the state, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, impose felony criminal liability for violating a child pornography statute, in the absence of mens rea?

a. Does the state violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it imposes criminal liability upon Petitioner for violating a child pornography statute, in light of undisputed evidence that Petitioner relied upon the state's own representations as to the age of the performer involved?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Argument:	
I. The decision of the Minnesota Supreme Court upholding the constitutionality of a child pornography statute imposing absolute criminal liability upon a Defendant regardless of his knowledge or scienter as to a minor's age is in direct conflict with applicable decisions of this court and at least one United States Court of Appeals, requiring review under Rule 10(b) of this court	7

A. The decisions of this Court compel invalidation, under the First Amendment, of a statute which imposes absolute criminal liability for child pornography upon a Defendant, regardless of scienter as to the minor's age 8

B. The decision of the Minnesota Supreme Court in upholding the validity of the statute on First Amendment grounds is also in direct conflict with decision of the United States Court of Appeals for the Ninth Circuit 16

II. Apart from First Amendment considerations, the Minnesota Supreme Court's upholding of the statute in question on due process grounds conflicts with both decisions of this court and Courts of Appeals, within the meaning of Rule 10(b) of the rules of this court 19

III. Due Process considerations also compel reversal of the conviction, given the fact that the state prosecuted Petitioner for her reliance on the state's own representations as to the performer's identity 23

Conclusion 27

TABLE OF AUTHORITIES

	Page
Constitution	
First Amendment to the United States Constitution .	1,2,8,9,11,12, 13,14,15,16, 19,29
Fourteenth Amendment to the United States Constitution	1,2,7,8
State Statutes:	
Minnesota Statutes Section 171.07 . . .	23,29
Minnesota Statutues Section 340A.53 . .	29
Minnesota Statutes Section 617.246 . . .	1,2,8,19,27
Federal Statutes:	
Title 28 U.S.C. Section 1257(a) . . .	1
Title 42 U.S.C. Section 408	28
Title 45 C.F.R. Section 5.67(c) . . .	28
Cases:	
Barnes v. Glen Theater, Inc., ___ U.S.___, 111 S.Ct. 38,112 L.Ed. 2d 15 (1990) .	28
California v. LaRue, 409 U.S. 109 . . .	28
Cox v. Louisiana, 379 U.S. 559 (1965) . .	25,26
Dennis v. United States, 341 U.S. 494, 500 (1951) .	22

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) . 28

Ginsberg v. New York, 390 U.S. 629, 643-44, (1968) 11,12,15,17

Hamling v. United States, 418 U.S. 87 (1974) . . 17

Koppinger v. City of Fairmont, 311 Minn. 186, (1976) 28

Lambert v. California, 355 U.S. 225 (1957) . . 22

Liparota v. United States, 471 U.S. 419, (1985) . 21

Miller v. California, 413 U.S. 15 (1973) . . 14

Miller v. Civil City of Southbend, 904 F. 2d 108 (7th Cir. 1990), cert granted sub nom. . . 28

Mishkin v. New York, supra, 86 S.Ct. 958, (1966) . 17

Morissette v. United States, 342 U.S. 246, 251 (1952) . 19,20,21, 22,28

New York v. Ferber, 458 U.S. 747 (1982) . . 13,14

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10,12

Osborne v. Ohio, ___ U.S. ___, 110 S.Ct. 1691 (1990) 13

Raley v. Ohio, 360 U.S. 423 (1959) . . . 24,26,29

Schad v. Borough of Mt. Ephraim, 452 U.S. 61, (1981) 28

Smith v. California, 361 U.S. 147, (1959) . . 9,12,15,17

Speiser v. Randall, 357 U.S. 513, 526, (1958) . . 11

State v. White, 464 N.W. 2d 585 (Minn. App. 1990) . 1

United States v. Brady, 710 F. Supp. 290 (D. Col. 1989) 26

United States v. Freed, 401 U.S. 601 (1971) . . 28,29

United States v. Laub, 385 U.S. 475, (1967) . . 26

United States v. Launder, 743 F. 2d 686 (9th Cir. 1984) 22

United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973) 26

United States v. United States District Court, 858 F. 2d 534 (9th Cir. 1988) 16

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 21

Opinions Below

Review is sought of the decision of the Minnesota Supreme Court entered March 15, 1991, denying Petitioner's Petition for Review. The decision is unreported and is set forth in the Appendix at A.87. The Minnesota Supreme Court refused to grant review of the decision of the Minnesota Court of Appeals in State v. White, 464 N.W. 2d 585 (Minn. App. 1990).

Jurisdiction

Review is sought of the decision of the Minnesota Supreme Court entered March 15, 1991. Jurisdiction is based upon Title 28 U.S.C. Section 1257(a).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution, and Minnesota Statutes Section 617.246, the texts of which are set forth in the Appendix at A.88 - A.91.

Statement of the Case

Petitioner in the above-entitled matter was charged by formal complaint with a single count of using a minor in a sexual performance, in violation of Minnesota Statutes Section 617.246, Subd. 2, which provides, in pertinent part, as follows:

> "It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance." [1]

Subdivision 5 of the same section also provides as follows:

> "Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section."

On August 3, 1989, Petitioner brought a motion in the District Court seeking to dismiss the criminal complaint, inter alia, on the ground that Minnesota Statutes Section 617.246, in particular, Subd. 5, precluding a defense as to reasonable mistake as to age was unconstitutional, in that it violated both the First Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. A copy of said Motion to Dismiss is set forth in the Appendix at A.21 - A.24.

On October 10, 1989, the District Court, by the Honorable Jack Litman, issued an Order and Memorandum denying Petitioner's motion in all respects. A copy of said Order and Memorandum is set forth in the Appendix at A.42 - A.52.

The matter was tried before Judge Litman to a jury, beginning January 22, 1990.

At trial, Duluth Police Officer John Christianson testified that he went to the Wabasha Bookstore in Duluth, Minnesota, on May 5, 1989, in response to information from the Woodland Hills Juvenile Center then an underage female by the name of Rachelle Reynolds was working at the Bookstore as a nude dancer (T.36). He testified that he went to the bookstore knowing Rachelle Reynolds' name and having a photograph of her (T. 37). He testified that after observing Ms. Reynolds engage in conduct which included the fondling of her breasts, the exhibition of her genitals, and the stroking of her pubic area (T. 44), he later confronted Ms. Reynolds (T. 47 - 48).

He testified that Rachelle Reynolds identified herself to him as "Sheryl Reynolds" and gave him an official State of Minnesota identification bearing the name "Sheryl Reynolds" (T. 49). He then testified that, with the Minnesota identification in his possession, he inquired of Rachelle Reynolds as to her name, address, and date of birth, and that Rachelle Reynolds responded with the name, address, and date of birth contained on the identification card (T. 49, 56-57).

Despite the facially valid identification, Officer Christensen said

to Rachelle Reynolds, "You're not Sheryl, you're Rachelle," which Rachelle Reynolds admitted (T. 49). She also admitted to beign only 17 years of age as opposed to the 26 years of age indicated on the identification card. (T. 49). Christensen testified that Rachelle Reynolds had no other identification and was placed under arrest for misrepresenting her age to a police officer (T.49).

Rachelle Reynolds testified that her date of birth was April 16, 1972, making her 17 years of age on the date of her arrest on May 5, 1989 (T. 67, 71).

She testified that she had sister: Sheryl, 26 years of age, born on January 26, 1963. Rachelle Reynolds testified that she obtained the false identification she presented to Officer Christensen by stealing her sister Sheryl's birth certificate from her father's filing cabinet, taking her sister's birth certificate to the Hennepin County Library, falsely representing herself to be Sheryl Reynolds, and receiving an official Minnesota identification bearing her photograph, but her sister's name and date of birth (T. 106). She testified that at no time did any Hennepin County official ever question whether she was in fact Sheryl Reynolds, with a date of birth of January 26, 1963 (T. 107).

Rachelle Reynolds testified that her purpose in obtaining the

false identification in the name of her sister Sheryl was to get into bars to buy liquor, and to get employment as a dancer in a bookstore, since she knew that she would be unable to do so unless she could prove she was 18 years of age (T. 109 -110).

Rachelle Reynolds testified that she sought employment as a dancer at an adult bookstore at Chicago and Lake Street in Minneapolis. (T. 73-74). She testified that she was interviewed for employment by Petitioner Eve White (T. 77). She testified that Petitioner, during the interview, immediately asked her to produce identification showing proof of age, to which she responded with the official State of Minnesota I.D. issued in the name of her sister Sheryl (T. 79). She also testified that Petitioner also requested a second identification to verify the first one, in particular, a Social Security card (T. 80). Rachelle Reynolds responded by representing that her Social Security card was at home, and stating that she would call back with a Social Security number, which she did. She testified she called back and gave a false Social Security number, switching two numbers on her own Social Security number (T. 80). In addition she was told to fill out and sign a W-4 form for tax purposes (T. 82).

At the conclusion of the state's case, Petitioner moved to dismiss

the complaint, inter alia on the ground that the evidence plainly established that Petitioner operated under a reasonable mistake of fact, to-wit: mistake as to Rachelle Reynold's identity, as opposed to Rachelle Reynold's age, specifically excluded as a defense under the statute. (T. 211).[2] The motions were denied (T. 219).

Testifying in her own defense, Petitioner testified that her efforts at verifying the age of Rachelle Reynolds were the same that she used with all of her dancers, including demanding a Minnesota Drivers License or an official State of Minnesota identification (T. 415). In addition, she testified that she would customarily take the identification, say that she did not have her glasses and could not read it, and ask the applicant to repeat her name, address, and date of birth, so that she could verify the information given against that in the identification (T.457).[3] In addition, applicants were made to complete and sign a W-4 form, and the signature on the form was then matched against the signature on the identification card (T. 457 - 458). Obviously this checked out as well, since the false identification card bearing Rachelle Reynolds' sister's name and date of birth also bore both Rachelle Reynolds' photograph and signature.[4]

On January 26, 1990, the jury rendered a verdict of guilty on the

offense charged

(T. 575).

On February 5, 1990, Petitioner brought a Motion for Judgment of Acquittal notwithstanding the verdict, and alternative motion for new trial, alleging, inter alia, that a defense as to mistake of identity was constitutionally compelled, in that the Due Process Clause of the Fourteenth Amendment precluded the state from prosecuting Petitioner when Petitioner undi. putably relied upon the state's own representations, through its official identification card, as to the performer's identity and age. A copy of said motion is set forth in the Appendix at A.53 - A.55. On February 23, 1990, said motions were denied in their entirety by Judge Litman. See sentencing transcript at p. 11. The judgment of conviction was affirmed by the Minnesota Court of Appeals on December 31, 1990. See State v. White, supra, 464 N.W. 2d 585 (Minn. App. 1990). On March 15, 1991, the Minnesota Supreme Court denied Petitioner's Petition for Review.

Petitioner now seeks a Writ of Certiorari.

Argument

I. The decision of the Minnesota Supreme Court upholding the constitutionality of a child pornography statute imposing absolute criminal liability upon a Defendant regardless of his knowledge or

scienter as to a minor's age is in direct conflict with applicable decisions of this court and at least one United States Court of Appeals, requiring review under Rule 10(b) of this Court.

A. The decisions of this Court compel invalidation, under the First Amendment, of a statute which imposes absolute criminal liability for child pornography upon a Defendant, regardless of scienter as to the minor's age.

As already noted, supra, Minnesota Statutes Section 617.246, Subd. 5 provides that a genuine, good faith mistake as to a minor's age is not a defense to prosecution under the statute. This means that the producer of a book, magazine, or motion picture film can take every reasonable step to assure that a participant in his or her production is over the age of 18, but that if a minor is used in such production, absolute criminal liability will be imposed regardless of the Defendant's good faith, mistake, or lack of knowledge. The decisions of this Court plainly hold that such an imposition of absolute criminal liability, regardless of the scienter of the Defendant, violates the First and Fourteenth Amendments to the United States Constitution.

Simply stated, as this Court has reiterated in every First Amendment decision on this point for many decades, strict liability (civil or criminal) may not be imposed for expressive conduct. Because of the inevitable chilling effect strict liability casts over the exercise of free

expression, Smith v. California, 361 U.S. 147, (1959), our Constitution does not permit a regime under which the speaker or artist must assume the risk of criminality or civil liability arising from the creative or communicative conduct. To safeguard the fundamental right of free expression, a Defendant must, on the contrary, be shown to have known the facts which left his or her communication unprotected by the First Amendment.

In Smith v. California, supra, 361 U.S. 147 (1959), this Court struck down an ordinance construed as imposing strict criminal liability upon a bookseller for possession of an obscene book. This Court indicated that on general due process grounds, such an abrogation of the mens rea requirement was suspect, 361 U.S. at 1509, but held more particularly that under the First Amendment, the ordinance "has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." Id. at 155.

Although the states may legitimately punish obscenity as unprotected speech, the Court noted that:

> "Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had no notice of the character of the

books they sold." Id. at 152.

Faced with strict criminal liability, a bookseller

> "will tend to restrict the books he sells to those he has inspected; and thus, the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature... The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship affecting the whole public, hardly less virulent for being privately administered." Id. at 153-154.

The rationale of Smith was also adopted and further developed in the landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in which this Court held a public figure could not recover damages for a defamatory publication related to official conduct in the absence of proof that the statement was made with "actual malice" -- i.e., knowledge that it was false or with reckless regard as to its truth or falsity. Such a heightened burden of proof is required, the Court observed, so that "debate on public issues should be uninhibited, robust and wide open," 376 U.S. at 270, and not subjected to a "pall of fear and timidity imposed upon those who would give voice to public criticism." Id. at 278. As this Court had noted in Smith, the paramount concern is

that abuses of the rights of free speech in press not be subjected to sanctions, either civil or criminal, so severe as to chill the legitimate exercise of those freedoms. The threat of "libel judgments virtually unlimited in amount...leads to a ...'self-censorship,'" comparable to the imposition of strict criminal liability in Smith, and would make speakers "tend to make only statements which 'steer far wider of the unlawful zone.'" Id. at 279, quoting Speiser v. Randall, 357 U.S. 513, 526, (1958).

Similarly, Ginsberg v. New York, 390 U.S. 629, 643-44, (1968), upheld a New York statute under which "knowing" sale of obscene materials to minors was defined to include:

> "'reason to 'know' or 'a belief or ground for belief which warrants inspection or inquiry of both: (i) the character and content of any materials described which is reasonably susceptible of examination by the Defendant and (ii) the age of the minor.'"

The statute in Ginsberg thus required the state to prove at least negligence on the part of the Defendant in failing to ascertain whether a customer was of legal age, and furthermore provided a defense of reasonable mistake as to the minor's age.

The common theme in all of these decisions that in order to impose either criminal or civil liability upon a Defendant for expressive activity which falls outside the protection of the First Amendment,

Government is obligated to make some showing that the Defendant possessed knowledge or scienter of the facts which led the expressive activity to fall outside First Amendment protection. Thus, in the area of obscentity, under Smith v. California, supra, 361 U.S. 147 (1959), a Defendant must be shown to have knowledge of the content and character of the work, since it is the content and character of the work which would render it outside the protection of the First Amendment. Likewise, in New York Times v. Sullivan, supra, 376 U.S. 254 (1964), knowledge of falsity or reckless disregard for the truth is required, since it is the falsity of the alleged defamatory statement which brings it outside the protection of the First Amendment. In the most analagous situation, Ginsberg v. New York, supra, 390 U.S. 629 (1968), both knowledge of the content of the material sold to minors, and at least negligence as to the minority of the customer was required, since both the content of the material in question and the age of the recipient were necessary to bring the material outside First Amendment protection.

Although this Court has not directly ruled on the issue, in at least two decisions relating to the child pornography exception to the First Amendment, this Court has strongly implied that some measure of knowledge or scienter as to the age of the performer is constitutionally

mandated in order to impose criminal liability for child pornography. In New York v. Ferber, 458 U.S. 747 (1982), the decision in which this Court pronounced, for the first time, a child pornography exception to the First Amendment, this Court upheld the statute which required, as an essential element of the offense, that the Defendant knew the character and content of the performance and materials, and more importantly, provided an affirmative defense of good faith belief that the minor was of legal age. In upholding the statute, the United States Supreme Court stressed that the usual First Amendment limitations apply to the definition and punishment of child pornography as unprotected speech, to-wit: the prohibited conduct must be adequately defined and delimited and, as in the case of obscenity, "criminal responsibility may not be imposed without some element of scienter on the part of the Defendant." 458 U.S. at 465.

More recently, in Osborne v. Ohio, __ U.S. ___, 110 S.Ct. 1691 (1990), this Court rejected a challenge to Ohio's child pornography statute on scienter grounds, not because it held scienter as to a minor's age not constitutionally required; rather this Court found that the Ohio Statute could be construed to include an element of scienter, since the Ohio statute required reckless as the element of mens rea. See Id. at

1698.

Moreover, this Court explicitly held that due process required that the jury be instructed on the state's burden of proving scienter, rejecting the Defendant's contention that no such instruction was given, only because Defendant waived the argument by failing to request such an instruction. See Id. at 1703.

The reasons advanced by the Minnesota Court of Appeals for rejecting the clear mandates of this Court are unpersuasive at best.

First of all, the court reasoned that the statute does not eliminate scienter altogether, because the statute, in Subd. 2, "specifically requires that a person subject to its enforcement must know or has reason to know that the conduct intended is a sexual performance." 464 N.W. 2d at 588. What this argument ignores is the fact that the scienter required by Subd. 2, to-wit: the sexual nature of the performance, does not require that the Defendant have any knowledge of facts which would bring the performance outside the protection of the First Amendment. Unless the performance is legally obscene under Miller v. California, 413 U.S. 15 (1973), or involves a minor, under New York v. Ferber, supra, 458 U.S. 747 (1982), nothing about the fact that the performance involved sexual conduct as defined by statute brings the material outside the

purview of First Amendment protection. As already noted, supra, knowledge of the facts bringing material outside the protection of the First Amendment has been constitutionally mandated in every First Amendment case decided by this Court since Smith v. California, supra, 361 U.S. 147 (1959). See, in particular, Ginsberg v. New York, supra, 390 U.S. 629 (1968), requiring knowledge of both the contents and character of the material and at least neglience as to the age of the distributee, since it was only distribution to minors which rendered the conduct outside the protection of the First Amendment.

Secondly, the Court of Appeals reasoned, without support in the record or in logic, that the statute "deters only a limited amount of conduct." Id. at 589. In fact, rather than requiring an "exhaustive investigation" of a minor's age (Id. at 589), what the statute does is assure that no investigation, regardless of how thorough, how exhaustive, or how in good faith, will never constitute a defense, if a minor is accidently hired. Clearly if this is the law, the only way that one can ever assure compliance with the law is to hire no one to engage in nude dancing, clearly suppressive of First Amendment activity.

Finally, the Court of Appeals argued that violation of First Amendment principles is necessary because of the state's strong interest

in the protection of children. Id. at 589. In fact, the statutory provision does not protect children in general, but only a limited class of fraudulent 16- or 17-year olds, who pass themselves off as adults. Because good faith is no defense, the statutory provision punishes, not the unscrupulous child pornographer, who could not benefit from a reasonable mistake as to age defense in any event, but rather only the conscientious promoter of First Amendment activities who conscientiously attempts to comply with the law. The state's interest in "protecting" only the guilty at the expense of only the innocent was not articulated by either Respondent below or the Court of Appeals in its opinion. Petitioner asserts that it is either minimal or non-existent.

B. The decision of the Minnesota Supreme Court in upholding the validity of the Statute on First Amendment grounds is also in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit.

In addition to being in direct conflict with the applicable decisions of this Court regarding scienter in First Amendment cases, the Minnesota Supreme Court's decision is also in direct conflict with the decision of the United States Court of Appeals in United States v. United States District Court, 858 F. 2d 534 (9th Cir. 1988), in which the court authoritatively construed the Federal Child Pornography Statute to permit a Defendant

to produce mistake as to age as an affirmative defense to a child pornography charge, as a requisite to the constitutional validity of the statute. The court reasoned that in the absence of a mistake as to age defense, the Federal Child Pornography Statute would be unconstitutional. After citing the scienter requirements constitutionally mandated in Smith v. California, supra, 361 U.S. 47, (1959); Hamling v. United States, 418 U.S. 87 (1974); Ginsberg v. New York, supra, 390 U.S. 629, (1968); Mishkin v. New York, supra, 86 S.Ct. 958, (1966); and New York v. Ferber, supra, 458 U.S. 747, the court stated:

> "We read these Supreme Court cases as holding that a speaker may not be put at complete peril in distinguishing between protected and unprotected speech. Otherwise, he could only be certain of avoiding liability by holding his tongue, causing him 'to make only statements which "steer far wide [] of the unlawful zone."' [Citation omitted.]' As the Court noted in this Term, 'a rule that would impose strict liability on a publisher for [unprotected speech] would have an undoubted "chilling" effect on speech... that does have constitutional value' [citation omitted.]
>
> Section 2251(a) will have precisely this effect, Defendants tell us, unless they are permitted to present a reasonable mistake of age defense. They point out that an actor's chronological age cannot be precisely ascertained from his appearance. Some 16- or 17-year-olds may look older and more sophisticated than their peers; 19-or 20-year-olds may look youthful and immature. The Court recognized as much in Ferber when it noted that 'if it were necessary for literary or artistic value, a person over the statutory

> age who perhaps looked younger could be utilized.' 458 U.S. at 763. Age may also be ascertained on the basis of other evidence: birth certificates, driver's licenses or other identification; statements of those acquainted with the actor; reputation in the community. But Defendants, argue, none of these sources is infallible: documents can be, and frequently are, forged; people can be mistaken or lie; reputations may be based on unfounded rumor rather than fact." Id. at 529 - 540.

Plainly, the instant case is a perfect example of the "chilling effect" that the imposition of absolute liability would have upon protected speech. Despite the fact that both the United States Supreme Court and Minnesota Supreme Court have held nude dancing to be a form of constitutionally protected expression,[5] it is absolutely clear that the only way that Petitioner could have assured herself of avoiding criminal liability altogether would have been to hire no one to engage in nude dancing. As correctly noted by the Ninth Circuit, any and all documentation they could have secured to ascertain a dancer's age could have been forged and done so quite convincingly, as was the minor's identification in the instant case. Clearly, the net effect of imposing absolute criminal liability upon anyone who hires a nude dancer, who turns out to be a minor, regardless of the efforts taken to ascertain the minor's age, must necessarily be to assure that no one is ever hired to engage in nude dancing, despite the fact that the conduct is

constitutionally protected.[6]

II. Apart from First Amendment considerations, the Minnesota Supreme Court's upholding of the statute in question on due process grounds conflicts with both decisions of this court and Courts of Appeals, within the meaning of Rule 10(b) of the rules of this court.

It is an essential concept of our Anglo-American philosophy of criminal jurisprudence that a serious crime requires both a guilty act (actus reus) and a guilty mind (mens rea). "Crime [is] a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand," as this Court noted in the leading case of Morissette v. United States, 342 U.S. 246, 251 (1952). Although a distinction has arisen in modern times for offenses of a regulatory nature, which are malum prohibitum rather than malum in se and which entail neither severe criminal penalties nor grave damage to reputation, this Court has never upheld the imposition of strict liability for a serious felony offense like that created by Section 617.246. On the contrary, this Court and lower courts have indicated on numerous occasions that due process prohibits elimination of criminal intent as an element for such an offense.

The Supreme Court recognized in Morissette, supra, that the absence of a scienter requirement as to any fact necessary to make the

conduct subject to the criminal sanction created strict liability. In order to be convicted under the federal larceny statute at issue in Morissette, the Defendant had to be shown to have committed "knowing conversion," which the Court interpreted as requiring "more than knowledge that Defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." 342 U.S. at 270-271. Thus the Defendant could not have been convicted in the absence of knowledge that the property of which he took possession was capable of being converted, and so the Court implicitly held the Defendant should have been allowed to introduce evidence he thought the property was abandoned. Otherwise, the Court indicated, the Defendant could be convicted in the absence of any guilty knowledge or mens rea, a result incompatible with fundamental tenets of criminal jurisprudence which have emerged from centuries of common-law wisdom.

Noting that in the industrial era, a new class of regulatory offenses had developed for which criminal intent was not always required, this Court carefully distinguished such malum prohibitum offenses, along the lines of "health and safety" or "public welfare" regulation, from serious crimes. These regulatory offenses are distinguished by the facts

that "penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation," in contrast to crimes for which "the penalty is high and...the infamy is that of a felony." Id. at 256, 260.

This distinction is central to the Morissette analysis of the due process limitations of strict liability. Because the Court in Morissette was able to avoid the constitutional question and to hold that "mere omission...of any mention intent will not be construed as eliminating that element," the Court left open the question of "a precise line or... comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." Id. at 263, 260. This Court has subsequently had occasion to construe silent or ambiguous statutes to require an element of criminal intent, most recently in Liparota v. United States, 471 U.S. 419, (1985), but has never squarely faced the question of a statute creating strict liability for a serious felony. Clearly, however, congressional power to eliminate mental culpability for serious crimes is limited by due process, as the Court suggested in Morissette and reaffirmed in Liparota.

This Court also reiterated that strict liability is generally inappropriate when the offense is punishable by imprisonment or by other severe sanctions in United States v. United States Gypsum Co., 438

U.S. 422 (1978). "The existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," the Court noted, 438 U.S. at 436, quoting Dennis v. United States, 341 U.S. 494, 500 (1951). Citing Morissette, the Court construed the criminal antitrust provisions of the Sherman Act to require an intent element. The imposition of harsh criminal penalties on a strict liability basis, the Court observed, "would be difficult to square with the generally-accepted functions of the criminal law." Id., 438 U.S. at 442.

In the recent case of Liparota v. United States, supra, the Court interpreted ambiguous provisions creating the offense of food stamp fraud to include an element of mens rea. Again, this Court followed Morissette to construe the ambiguity in Defendant's favor under the rule of lenity, and the case raised no constitutional issue. But the Court noted that while generally, definition of the elements of an offense is entrusted to the legislature, "Congress must act within any applicable constitutional constraints in defining criminal offense." 105 S. Ct. at 2087, n. 6. See also Lambert v. California, 355 U.S. 225 (1957) (due process limits power of states to create strict liability for violation of a felony registration ordinance of which Defendant would likely have no notice).[7]

In this regard, see also United States v. Launder, 743 F. 2d 686

(9th Cir. 1984), and United States v. Wulff, 758 F. 2d 1121 (6th Cir. 1985).

III. Due Process considerations also compel reversal of the conviction, given the fact that the state prosecuted Petitioner for her reliance on the state's own representations as to the performer's identity.

An essential factor in determining whether Petitioner's conviction violated the due process clause is the undisputed evidence that Rachelle Reynolds did not act alone in misrepresenting her age and identity to Petitioner. The State of Minnesota was an active and crucial participant in that misrepresentation. In granting employment to Rachelle Reynolds, plainly relied upon an identification card issued by the State of Minnesota, plainly for the purpose of establishing an individual's identity and date of birth. The issuance of the card is mandated by Minnesota Statutes Section 171.07, Subd. 3, which provides as follows:

> "Upon payment of the required fee the department [of Public Safety] shall (emphasis supplied) issue to every applicant therefor a Minnesota Identification Card. The department may not issue a Minnesota identification card to a person who has a driver's license, other than an instruction permit. The card must bear a distinguishing number, assigned to the applicant, a colored photograph, the full name, date of birth, residence address, a description of the applicant in a manner the commission deems necessary, and a space upon which the applicant shall write the usual signature and date of birth of the applicant with pen and ink.

> Each Minnesota Identification Card must be plainly marked 'Minnesota Identification -- not a driver's license.' The fee for a Minnesota Identification Card issued to a person who is mentally retarded, as defined in Section 252.A.02, Subdivision 2 is 50 cents."

Plainly, the statute is intended for the purpose of according every person who is not a licensed driver a state-sanctioned method of establishing his or her identification and date of birth. In fact other Minnesota statutes specifically establish the Minnesota Identification Card as sufficient proof of identification and age to qualify for senior citizens benefits,[8] and for the purpose of purchasing liquor.[9]

Plainly then, when the State of Minnesota issued Rachelle Reynolds an official identification card, identifying her as Sheryl Reynolds, age 26, it did so plainly for the purpose of permitting her to establish her identity and age for all lawful purposes, including employment. Equally clear is the fact that due process of law precludes the state, as a matter of law, from imposing criminal liability upon Appellant for her reliance upon the state's own misrepresentations.

In Raley v. Ohio, 360 U.S. 423 (1959), the United States Supreme Court reversed contempt convictions for witnesses appearing before the Ohio Un-American Activities Commission, in a situation in which the chairman and members of the commission affirmatively represented that

the witnesses had a privilege not to answer questions they believed would incriminate them. Despite exercising the privilege commission members had indicated was available to them, the Defendants were prosecuted under the theory that the Ohio Immunity Statute removed the threat of criminal prosecution, thus making a self-incrimination claim unavailable to them. This Court held that due process prohibited the State from criminally punishing conduct the state's own agents represented was permissible. This Court stated:

> "While there is no suggestion that the commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the commission acted as it did would be to sanction the most indefensible sort of entrapment by the state --convicting a citizen for exercising a privilege which the state clearly had told him was available to him." 360 U.S. at 437-438.

Similarly, in Cox v. Louisiana, 379 U.S. 559 (1965), this Court reversed the conviction of a civil rights leader who was convicted of violating an East Baton Rouge, Louisiana ordinance prohibiting picketing "near a courthouse." The facts giving rise to the arrest were that the leader had conducted a demonstration approximately 101 feet from the courthouse, across the street, in a location for which permission to picket had been specifically granted by city officials, including the

police chief. The Court held, relying on Raley v. Ohio, supra, that the permission granted by the highest police officials to hold the demonstration where it was held constituted a representation that holding the demonstration at that location did not constitute demonstrating "near" a courthouse, within the meaning of the ordinance.

Subsequent decisions of both this Court and various lower federal courts have repeatedly reinforced the due process mandates of Raley and Cox. In United States v. Laub, 385 U.S. 475, (1967), this Court stated the following:

> "Ordinarily, citizens may not be punished for actions taken in good faith reliance upon authoritative assurance that punishment will not attach." Id. U.S. at 487.

See also United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973), and United States v. Brady, 710 F. Supp. 290 (D. Col. 1989).

The Minnesota Court of Appeals rejected this plainly compelled result by the one sentence assertion that "the State of Minnesota did not affirmatively participate in the conduct which lead (sic) to the criminal violation." 464 N.W. 2d at 590.

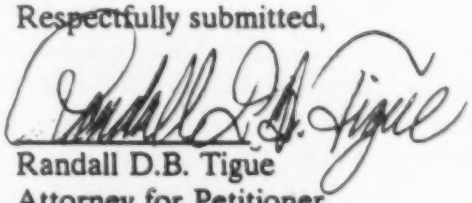
The record in this case plainly does not support the Court of Appeals' finding, since the undisputed testimony was that but for the state's affirmative act in issuing an identification which, in effect, told

Petitioner that it was lawful to hire Rachelle Reynolds, Rachelle Reynolds never would have been hired.[10]

Conclusion

For all of the foregoing reasons, Petitioner's Petition for Writ of Certiorari, should be in all respects granted.

Respectfully submitted,



Randall D.B. Tigue
Attorney for Petitioner
2620 Nicollet Avenue
Minneapolis, MN 55408
(612) 874-9903

Dated: June 7, 1991.

[1]As already mentioned, supra, the full text of Minnesota Statutes Section 617.246 is set forth in the Appendix at A.89.

[2]See Minnesota Statutes Section 617.246, Subd. 5. Because the issue of the construction of the statute is a matter purely of state law, the issue is not presented to this Court for review, except to the extent that it impacts upon Petitioner's due process argument, infra.

[3]It should be noted that this is precisely the same procedure used by Officer Christensen to attempt to check Ms. Reynolds' identification at the time he arrested here. See T. 49, 56-57. In this regard, Officer Christensen admitted that had he not had the information from Woodland Hills Detention Center identifying Michelle Reynolds as a minor, it is possible that he would have been fooled by the identification as well. See T. 57.

[4]In this regard, it should be also noted that Rachelle Reynolds, in her testimony, verified that Petitioner made her complete and sign a W-4 form (T. 82).

[5]See California v. LaRue, 409 U.S. 109, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, (1981); and Koppinger v. City of Fairmont, 311 Minn. 186, (1976). See also Miller v. Civil City of Southbend, 904 F. 2d 1081 (7th Cir. 1990), cert granted sub nom., Barnes v. Glen Theater, Inc., __ U.S.___, 111 S.Ct. 38, 112 L.Ed. 2d 15 (1990).

[6]Respondent's argument below that White could have ascertained the falsity of the identification presented by Sheryl Reynolds by "checking out" her social security number is transparently without merit. To begin with, the Social Security Administration specifically prohibits the release of information concerning individuals' social security numbers. See Title 45 C.F.R. Section 5.67(c). See also Title 42 U.S.C. Section 408 making unauthorized disclosure of social security numbers a criminal offense. At trial, Eve White testified, without contradiction, that her attempts to verify social security numbers uniformly met with frustration, since the Social Security Administration would not give out written numbers without written permission, and even upon receipt of written permission it would take from six weeks to six months to get the information back, making it impossible to hire as a practical matter (T. 434-435). More importantly, however, even if it were possible to "check out" a social security number, that would, by no means, guarantee freedom from prosecution. Had Rachelle Reynolds stolen her sister's social security card, as well as her birth certificate, "checking out" the social security would have done nothing more than further verify the false identification. Petitioner would nonetheless be subject to prosecution under Section 617.246, since no effort at verification, no matter how extensive, could ever constitute a defense under the statute.

[7]The only modern Supreme Court decision to have upheld strict liability for a felony offense, United States v. Freed, 401 U.S. 601 (1971), illustrates the inappropriateness of strict liability for the offense at issue in this case. In Freed, this Court distinguished the crime of possessing unregistered hand grenades from a serious, malum in se crime of the type considered in Morissette: "This is a regulatory measure in the interest of public safety." 401 U.S. at 609. Strict liability as to the hand grenade's registration status was appropriate because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons." Id. The Defendant, having undertaken to possess such a weapon, would have at least

constructive knowledge of the legal requirement of registration, and would be able to ascertain beyond any doubt the weapon's registration status.

The statute in Freed did not, however, eliminate the element of criminal intent entirely, however, and if the Defendant did not know the hand grenade was a weapon, e.g., believed it to be an artichoke, or did not knowingly possess it, he could not be convicted. Thus the mistake of fact defense would still be available to negate the existence of mens rea.

The present case, of course, involves First Amendment activity which is not properly the subject of strict liability, and a factual element which the Defendant often is unable to determine with complete certainty. As in Freed, because reasonable mistake as to that fact would negate any criminal intent whatsoever, evidence of such mistake must be admissible by way of defense.

[8]See Minnesota Statutes Section 171.07, Subd. 3a.

[9]See Minnesota Statutes Section 340A.53.

[10]In this regard, it should be noted that in Raley v. Ohio, supra, United States Supreme Court clearly held that it was irrelevant whether the representation relied upon by the citizen to his detriment was deliberately fraudulent or not. See 360 U.S. at 437-438.

90-1909 (2)

FILED
JUN 13 1991
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1990
No.

Eve White, a/k/a, Eve Cascio,

Petitioner,

vs.

State of Minnesota,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Randall D.B. Tigue
Attorney for Petitioner
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

APPENDIX INDEX

Complaint	A.1
Petitioner's Notice of Motion and Motion to Dismiss Criminal Complaint	A.21
Affidavit of Randall D.B. Tigue	A.25
Omnibus Hearing Order	A.42
Petitioner's Notice of Motion and Motion for Judgment of Acquittal Notwithstanding the Verdict	A.53
Petitioner's Memorandum in support of Motion for Judgment of Acquittal	A.56
Opinion of Minnesota Court of Appeals	A.72
Order of Minnesota Supreme Court denying Petition for Review	A.87
Texts of Constitutional and Statutory Provisions	A.88

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

STATE OF MINNESOTA

Plaintiff,

COMPLAINT

vs.

Eve White a/k/a Eve Cascio,

Defendant.

The Complainant being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the Defendant committed the following offense(s). The complainant states that the following facts establish PROBABLE CAUSE:

That your complainant is a Lieutenant with the Duluth Police Department and is familiar with persons submitting reports in this matter, believes those persons to be reliable and their reports to be true and correct.

On Friday, May 5, 1989, the Duluth Police Department Juvenile Bureau

received a complaint that a 17-year-old female was performing/dancing in the upstairs of the Wabasha Book Store located at 13 - 15 E. Superior Street in downtown Duluth, Minnesota. This 17-year-old female was identified by name and photograph as a minor from Bloomington, Minnesota.

At approximately 8:40 p.m. on May 5, Duluth Police Officers Christensen, Ells and Thamm went to the Wabasha Book Store to investigate this complaint. Officers Ells and Thamm remained outside the store while Officer Christensen went into the store. Officer Christensen asked a clerk in the downstairs area of the store if they had "girls performing". He pointed to a door and said, "Through that door and upstairs". Christensen then went to the upstairs area where he met another clerk. Christensen asked this clerk if they had "girls performing". The clerk replied, "Yes". The clerk stated that for $1 Christensen could get four tokens and that the tokens could then be used in small viewing rooms in order to raise panels and observe the dancers. Christensen purchased four tokens for $1 and went to a room and entered. Christensen placed four tokens in a slot causing a panel

to rise. Christensen then observed a female start to dance. This woman was dressed in panties and a sleeveless top. She had blond hair. Christensen knew this was not the 17-year-old female previously identified to him by name and photograph. The dancer came to the window stating that she was "Nicki" and that Christensen needed to tip her $1 before she would dance. Christensen then gave "Nicki" $1. She started to dance, partially removing her top, exposing her breasts. She then rubbed her breasts in a sexual manner. She then came back to the window and stated she would like to meet Christensen in the "rap room". Christensen asked if there were any other dancers, at which time the panel covering the glass window went down.

Christensen went back to the upstairs clerk/ cashier and purchased eight more tokens for $2. Christensen then went back to the viewing room and placed four more tokens in the slot. Again, a panel went up. Again, "Nicki", the blond-haired female came out to perform. Christensen once again asked if there were any other dancers, and within a short time, "Nicki" stopped dancing and another female entered. This female Christensen recognized as the 17-year-old female he had

seen a photograph of earlier. The panel then closed once again. Christensen then inserted four more tokens, and the panel went up again. The female whom Christensen believed to be the 17-year-old from Bloomington, Minnesota came over to the window and told Christensen he needed to tip her $1 before she would start dancing.

Christensen then gave her $1 and she started to dance. She was dressed in panties and a red top. Once she started dancing, she lowered her top below her breasts and began to rub her breasts, caressing and stoking them in what Christensen believed to be a sexual manner. She then placed her right leg up alongside the window Christensen was looking through. She then slid her panties to the side exposing her vagina. She then with her left hand stroked her vagina in a sexual manner. She then asked Christensen to meet her in the "rap booth", stating she would be there at 9:00. The panel then closed and Christensen left and viewing booth.

Christensen then went back downstairs and outside to meet Officers Ells and Thamm. All three officers then went back into the Wabasha Book

Store at approximately 9:00 p.m. Officer Thamm remained downstairs getting information from the downstairs clerk. Officers Ells and Christensen went upstairs to talk to the upstairs clerk. Officers Ells and Christensen identified themselves as Duluth Police Officers and asked to speak to the second dancer Christensen had just seen perform. The upstairs clerk buzzed the door for the officers so they could enter an "Employees Only" area.

In this area, Christensen and Ells again identified themselves as Duluth Police Officers. They talked with the two dancers in this area: the blond-haired dancer named "Nicki" later identified as 25-year-old V.J.S. of Minneapolis, Minnesota; and 17-year-old R.A.R. of Bloomington, Minnesota.

R.A.R. first identified herself to the officers by means of a false Minnesota Identification Card as her 26-year-old sister, C.L.R.; however, upon further questioning, R.A.R. admitted her true name and her true age to be 17 years (dob: 4-16-72). Subsequently, Officer Christensen obtained a certified copy of a birth certificate for R.A.R., in fact, stating

her date of birth to be April 16, 1972.

R.A.R. went to the Duluth Police Department with the officers on the evening of May 5, 1989. There she talked with the officers and gave them a written statement. In these statements, R.A.R. indicated that she had started dancing approximately ten days earlier in Minneapolis. R.A.R. indicated that she went to the Chicago and Lake Street book store in Minneapolis and talked with a woman named "Eve" about getting a job dancing. R.A.R. explained that she gave "Eve" he false ID of her sister, C.L.R. "Eve" then hired R.A.R. to dance. "Eve" told R.A.R. that the terms of employment were: be on time; no prostitution; and $1.50 per hour wages with R.A.R. getting to keep all the tips she made. R.A.R. explained that "Eve" also made out the work/dancing schedule for her. R.A.R. said she would then get paid once a week every Sunday. R.A.R. stated that she danced/performed four nights at different stores in Minneapolis. Her dad then found out what she was doing so she asked "Eve" if she could go to Duluth to work. "Eve" then scheduled R.A.R. to dance/perform at the Wabasha Book Store in Duluth starting Monday, May 1, 1989.

R.A.R. stated that during the week of May 1-5, 1989, at the Wabasha Book Store in Duluth, she made the following amount of money: on Monday, she worked eight hours and made $215 in tips; on Tuesday she worked eight hours and made approximately $150 in tips; on Wednesday, she worked two hours and made $75 in tips; on Thursday, she worked eight hours and made $185 in tips; so far on this day, Friday, May 5, before being arrested by police, she had worked a little over two hours and had made $26 in tips. R.A.R. explained that she was making approximately the same amount of money when she was dancing at the stores in the Minneapolis area, averaging about $175 in tips per night.

R.A.R. also told the officers that when she gave the false C.L.R. card to "Eve" in order to be employed as a dancer, "Eve" stated that "I looked younger". R.A.R. also explained that "Eve" did all the hiring and scheduling for all the girls dancing/performing at all the book stores in the Minneapolis area and Duluth. R.A.R. stated that when she came to Duluth, she went to one of the clerks at the Wabasha Book Store at 13-15 E. Superior Street, asked for a time card, filled it out and then started working on Monday, May 1. R.A.R. stated that while she was

in Duluth during the first week of May, she stayed at an apartment owned by the Wabasha Book Store located at 633 E. 4th Street in Duluth. R.A.R. explained that she paid $5 a day to live there, as did all the dancers from the Twin Cities.

Follow-up investigation of this matter by Officer Christensen has revealed the following additional facts. The manager of the Wabasha Book Store located at 13-15 E. Superior Street in Duluth is the John William Sarette. On May 26, Sarette talked with Officer Christensen at the Duluth Police Department. Sarette indicated that he has worked at the Wabasha Book Store in Duluth at several different locations for the past 17 years. Sarette indicated that the owner of the Wabasha Book Store is Ferris Jacob Alexander, Sr. Sarette indicated that female dancers had been performing in the upstairs of the Wabasha Book Store for about 2-1/2 months. Sarette indicated that Ferris Alexander made the decision to have dancers at the Wabasha Book Store. Sarette indicated that Alexander hired a construction company to remodel the Wabasha Book Store by building a stage area for the dancers and viewing books around the stage for customers to watch the dancers.

Sarette went on to explain that the dancers at the Wabasha Book Store were sent to Duluth by a female named "Eve" in Minneapolis. Sarette stated that he did not know "Eve's" last name. Sarette explained that "Eve" sent a dancing schedule with the dancers. Sarette stated that occasionally "Eve" would call him to ask how things are going and to tell him the name of a dancer who would be coming to Duluth. Sarette stated he did not know the dancers' full names but only their "stage names". Sarette explained that the dancers would come from Minneapolis usually for two weeks at a time and then change. Sarette explained that the dancers stayed at an apartment owned by the Wabasha Book Store located at 633 E. 4th Street in Duluth. Sarette explained that the dancers supposedly pay "Eve" for staying at this apartment while staying in Duluth. Sarette stated that the dancers receive $1.50 per hour wages. He stated that they are paid by check which is sent from Minneapolis to the Wabasha in Duluth. The checks are then handed out by Wabasha employees to the dancers. Sarette stated that these checks are drawn on a News Paper Club checking account in Minneapolis, and Sarette explained that these checks are signed by Ferris Alexander. Sarette explained that the dancers get paid

once a week just as the other Wabasha employees.

Sarette told Officer Christensen that the dancers were hired by "Eve" to do exotic dancing which in his explanation is similar to the strip-type dancing they do at the Club Saratoga; however, Sarette went on to explain that he had never watched the dancers at the Wabasha or at the Saratoga so he did not know what type of dancing that was.

Sarette told Officer Christensen that he usually had four or five dancers performing during a week, taking turns working different shifts. Christensen asked Sarette if he (Sarette) knew the 17-year-old dancer R.A.R. Sarette stated he had probably seen her in the book store, but he (Sarette) did not know what her name was or anything about her. Sarette explained that when a dancer comes to the Wabasha in Duluth, she signs in with the upstairs clerk in the store and then goes in and does her dancing. Sarette also told Officer Christensen that he had received some complaints from customers at the Wabasha Book Store that the dancers wanted too much in tips to dance. Sarette, on the other hand, heard from customers at the Wabasha that the dancers were

very good and better than those at the Saratoga. Sarette went on to explain that he did not know what that meant, as he did not ask the customers for any further explanation.

Sarette ended his May 26 conversation with Officer Christensen by stating that he (Sarette) did not agree with what was going on at the Wabasha Book Store at this time, and because of this he (Sarette) was presently looking for other work.

On May 26, 1989, Officer Christensen also interviewed Wabasha Book Store employees Clifford Bergstrom and Daniel Engstrom. Bergstrom was the downstairs clerk at the Wabasha Book Store on the evening of May 5, 1989, and Engstrom was the upstairs clerk at the Wabasha Book Store that evening when Officer Christensen came to the store and observed 17-year-old R.A.R. dancing. Bergstrom indicated that he has worked for Ferris Alexander in either a handyman or clerk capacity for 3-1/2 years. Engstrom indicated that he has worked at the Wabasha Book Store in Duluth for approximately 2-1/2 years, working at a number of different buildings that Ferris Alexander owned in Duluth.

Both Bergstrom and Engstrom indicated during their separate interviews that Ferris Alexander owns the Wabasha Book Store, and John Sarette manages the store. Both men stated that the female exotic dancers have been performing at the store for approximately 2-1/2 months. Both men stated that Ferris Alexander hired a construction crew from the Minneapolis area to do the remodeling work at the book store which resulted in a stage tor the dancers and viewing booths for customers around the stage being built. Bergstrom indicated that Ferris Alexander, himself, came to the Wabasha Book Store in Duluth at least once to check on how the construction of the stage and viewing booths was going. Both Bergstrom and Engstrom indicated that the hiring and scheduling of the dancers was done by a woman named "Eve" in Minneapolis. Both men stated that back in February, 1989, "Eve" came to Duluth from Minneapolis to interview local women to work as dancers. Both men stated that "Eve" sends the girls up to Duluth along with a schedule of when they are to perform. Both men told Officer Christensen that the rules for the dancers including the following: no prostitution/ propositioning allowed and no drugs or alcohol allowed. Both Bergstrom and Engstrom stated that they had never personally

observed the dancers perform at the store. Bergstrom indicated that the dancers received their pay by check which was sent from Minneapolis. Bergstrom stated that these checks were drawn on the checking account of the "News Paper Club". Bergstrom stated that these paychecks were signed by Ferris Alexander.

On May 30 and June 12, 1989, Sgt. Scott Lyons of the Duluth Police Department spoke with the manager of the apartments located at 633 E. 4th Street in Duluth. The manager's name is Marcia Pitesa. Ms. Pitesa indicated to Sgt. Lyons that on February 23, 1989, the manager of the Wabasha Book Store in Duluth (John Sarette) came to her office and paid a $100 deposit for rent of Apt. A at 633 E. 4th Street. On March 1, 1989, and again on April 1, 1989, another $315 was obtained in payment for this room from Sarette. Ms. Pitesa stated that Sarette paid her in cash. Ms. Pitesa stated that girls who are working at the Wabasha Book Store live at this apartment. Ms. Pitesa also indicated that she has spoken with a woman named "Eve" over the phone several times. "Eve" indicated that she ("Eve") would be sending money to Ms.

Pitesa to pay for the rent of this apartment whenever that rent is past due. One of the application forms for one of the dancers staying in Apt. A lists as a personal reference the above-named defendant, Eve White of 741 E. Lake Street in Minneapolis, Minnesota.

Follow-up investigation reveals that 741 E. Lake Street in Minneapolis, Minnesota is the location of the Chicago-Lake Book Store which is owned by Ferris Alexander. Also, on the evening o May 5, 1989, when R.A.R. was at the Duluth Police Department with officers Christensen, Thamm and Ells, a woman identifying herself as Eve Cascio called the Duluth Police Department and talked with Officer Ells. This woman identifying herself as Eve Cascio stated she was an employee of the News Paper Club. This woman identifying herself as Eve Cascio also indicated to Officer Ells that she wanted to know what was happening with R.A.R.

On June 15, 1989, Officer Christensen interviewed Duluth News Tribune employee Liz Bardon. Ms. Bardon works in the advertising department at the Duluth News Tribune. During this conversation, Ms. Bardon

indicated that in May of 1989, a man who said he was the manager of the Wabasha Book Store in Duluth came to the Duluth News Tribune Offices and requested that Ms. Bardon put an ad in the newspaper for exotic dancing at the Wabasha Book Store located at 15 E. Superior Street. Ms. Bardon described this "manager" as a heavy set man with blond hair and bushy moustache. Given this description by Ms. Bardon and his own knowledge of John William Sarette, Officer Christensen believes that the individual who was placing the Wabasha advertisements for exotic dancing in the paper is, in fact, John William Sarette. In response to this request from Sarette, two advertisements were placed in the Duluth News Tribune advertising: "Live, On Stage, Beautiful Dancing Girls" at "The Wabasha" located at 15 E. Superior Street between "10:00 a.m.-2:00 a.m." during May, 1989. These advertisements appear in the May 26, 1989, and May 29, 1989, Duluth News Tribune. In addition, the February 23, 24, and 25, 1989, editions for the Duluth News-Tribune each contain the following "Grand Opening" advertisement for "The Wabasha" located at 15 E. Superior Street: "Grand Opening, Live on Stage, Beautiful Dancing Girls". Ms. Bardon explained to Officer Christensen that these advertisements by the

Wabasha Book Store are billed to A.Z. Adult Book Store located at 15 E. Superior Street in Duluth, Minnesota. Ms. Bardon explained that the "A.Z. Adult Book Store" account was an old account for the same store as Wabasha Book Store and to save paperwork, the name was not changed.

On June 15, 1989, Officer Christensen also talked with Ms. Renee M. Lucas of the accounting department at the Duluth News Tribune in Duluth. Ms. Lucas indicated that payments of the advertising bills for the Wabasha Book Store for April and May of 1989 had been received. Ms. Lucas indicated that this advertising account had been paid by check. Subsequently, Ms. Lucas forwarded a copy of an April 24, 1989, check used to pay this advertising account at the Duluth News Tribune to Officer Christensen. This April 24, 1989, check is Check #2417 drawn on the Union Bank and Trust Company of Minneapolis, Minnesota, checking account of the News Paper Club located at 315 E. Lake Street in Minneapolis, Minnesota. This check, payable to the order of the Duluth News-Tribune in the amount of $2,132.67 bears the signature of "Ferris Alexander" on the maker line of the check.

The above facts constitute the basis for believing the above-named defendant between approximately February 15, 1989, and May 6, 1989, at the City of Duluth in the above-named county committed the following described

OFFENSE

Charge: **Use of a Minor in Sexual Performance**, in violation of

Section: 617.246, Subd. 2 with reference to 617.246, Subd. 1 and 617.246, Subd. 5 and 609.05.

Maximum sentence: Five years and/or $10,000 for the first offense; Five years and/or $20,000 for a second or subsequent offense.

(description)

That the defendant, Eve White a/k/a Eve Cascio, while intentionally aiding, abetting, advising, counselling or conspiring with or being aided and abetted by others, did unlawfully promote, employ, use or permit a minor, to-wit: R.A.R., to engage in posing or modeling alone or with others in any sexual performance, said defendant knowing or having reason to know that the intended conduct of R.A.R. is a sexual performance as defined by law.

THEREFORE, Complainant requests said Defendant, subject to bail or conditions of release be:

(1) arrested or that other lawful steps be taken to obtain defendant's appearance in court; or

(2) detained, if already in custody, pending further proceedings;

and that said Defendant otherwise be dealt with according to law.

Complainant's Name: Beverly Ecklund

Being duly authorized to prosecute the offense(s) charged, I hereby approve this Complaint.

Date: June 23, 1989

Prosecuting Attorney:

Name/Title: John E. DeSanto

Assistant County Attorney

Address/Telephone: 100 N. 5th Ave.W., Rm 501

Duluth, MN 55802-1298

Tel: (218) 726-2323

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant(s) arrest or other lawful steps be taken to obtain Defendant(s) appearance in Court, or his detention, if already in custody, pending further proceedings. The Defendant(s) is/are thereof charged with the above-stated offense.

SUMMONS

THEREFORE You, THE ABOVE-NAMED DEFENDANT(S), ARE HEREBY SUMMONED to appear on the day , 19 at AM/PM before the above-named court at to answer this complaint.

IF YOU FAIL TO APPEAR in response to this SUMMONS, a WARRANT FOR YOUR ARREST shall be issued.

WARRANT

To the sheriff of the above-named county; or other person authorized to execute this WARRANT, I hereby order, in the name of the State of Minnesota, that the above-named Defendant(s) be apprehended and arrested without delay and brought promptly before the above-named Court (if in session, and if not, before a Judge of

Judicial Officer of such Court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

ORDER OF DETENTION

Since the above-named Defendant(s) is/are already in custody;

I hereby order; subject to bail or conditions of release, that the above-named Defendant(s) continue to be detained pending further proceedings.

Bail: 10,000

Conditions of Release:

This COMPLAINT - WARRANT, was sworn to subscribed before, and issued by the undersigned authorized Issuing Judicial Officer this, 27 day of June, 1989.

Name:

Title:

Sworn testimony has been given before the Judicial Officer by the following witnesses:

Caption Cited

NOTICE OF MOTION

TO: The above-named Plaintiff, and Mr. John E. DeSanto, Assistant County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, Minnesota 55802, its attorney:

PLEASE TAKE NOTICE that the above-named Defendant, by the undersigned, will bring the attached motion for hearing before the Omnibus Judge in his courtroom in the St. Louis County Courthouse, Duluth, Minnesota, on August 16, 1989, at 1:30 p.m., or as soon thereafter as counsel can be heard.

s/Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Defendant
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn. Sup.Ct. Lic.No. 110000

Dated: August 3, 1989.

Caption Cited

MOTION TO DISMISS
CRIMINAL COMPLAINT

The above-named Defendant, by the undersigned, hereby moves this Court for an order, pursuant to Rules 10 and 17 of the Minnesota Rules of Criminal Procedure, dismissing the criminal complaint against her on the following grounds:

I. Minnesota Statutes Section 617.246 is facially unconstitutional and unconstitutional as applied to Defendant, to the extent that it imposes absolute criminal liability upon the producer, director, or publisher of a film, book, magazine or live performance involving a sexual performance by a minor, regardless of the defense's knowledge or scienter of the minor's age:

A. The elimination of the scienter requirement renders the statute facially overbroad, as a violation of freedom of speech and of the press, as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and Article 1 Section 3 of the Minnesota Constitution.

B. The elimination of a scienter requirement deprives

Defendant of liberty without the process of law and of equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

II. The complaint fails to allege sufficient facts to enable a neutral and detached magistrate to find probable cause to believe that an offense has been committed or that Defendant committed the offense, on the following grounds:

A. If the statute is construed to preserve its constitutionality, so as to incorporate a scienter requirement, the complaint is facially insufficient, in that facts alleged in the complaint absolute negate the presence of scienter.

B. The complaint fails to allege sufficient facts to enable a neutral and detached magistrate to find probable cause to believe that the Defendant named herein is the person who committed the offense.

C. The complaint fails to allege sufficient facts to enable a neutral and detached magistrate to find probable cause to believe that the Defendant promoted, employed, or used a minor to engage in a sexual performance as that term is defined in Minnesota Statutes Section 617.246, Subds. 1(d), (e) and 2.

The foregoing motion shall be based upon the criminal complaint in the above-entitled matter, upon the attached affidavit and exhibits, upon the attached memorandum of law, and upon all of the files, records, and

proceedings herein.

s/Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Defendant
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn. Sup.Ct. Lic.No. 110000

Dated: August 3, 1989.

Caption Cited

AFFIDAVIT OF
RANDALL D.B. TIGUE

STATE OF MINNESOTA)

)SS

COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Defendant in the above-entitled matter.

2. Pursuant to a discovery request, your affiant has obtained from the prosecutor in the above-entitled matter an investigation report by Officer Christensen, dated 5/5/89, a copy of which is attached hereto as Exhibit A, and a Statement of Rachelle Reynolds, the alleged minor involved in the above-entitled matter, a copy of which is attached hereto as Exhibit B.

3. Your affiant executes this affidavit in support of the attached motion to dismiss the criminal complaint against Defendant.

s/Randall D.B. Tigue
Randall D.B. Tigue

Sworn to and subscribed to before

me this 10th day of August, 1989.

s/Marilee Kaeder
Marilee Kaeder, Notary Public

DULUTH POLICE DEPARTMENT
INVESTIGATION REPORT

Offense/Incident	Misrepresentation of Age		D a t e
Reported	05-05-89		
Time Reported	2100 hrs.		
Place of Occurrence	The Wabasha Book Store #13 E. Superior St. (upstairs), Duluth		
Date and Time of Occurrence	05-05-89, 2100 hrs.		
Reported By	Special Investigations Unit		
Address	Duluth Police Department		
Subject/Suspect	Rachelle Alayne Reynolds		
D.O.B.	04-16-72	Age	17
Sex	F	HGT	506
WGT	118	RACE	W
Home Address	9042 Highland Creek Road, Bloomington, MN 55437		
Home Phone	830-1241		

SYNOPSIS:

On 05-05-89, Sgt. England, of the Juvenile Bureau, received information

that a 17-year-old female, RACHELLE REYNOLDS, was performing in the upstairs of the Wabasha Book Store. We are aware that the Wabasha Book Store does have female who perform a burlesque-type show. Officers then did go into the Wabasha Book Store, undercover, observe the 17-year-old female performing, and subsequently arrested her for misrepresentation of age. She was lodged at the Arrowhead Juvenile Center and the vehicle she was in possession of was towed for safekeeping.

DETAILS OF OFFENSE/INCIDENT

DETAILS:

On 05-05-89, Sgt. England, of the Juvenile Bureau, advised Juvenile Officer Ells and myself (Christensen), of the Special Investigations Unit, that he had received information that a 17-year-old female, RACHELLE ALAYNE REYNOLDS, of Bloomington, Minnesota, was currently in Duluth and dancing or performing upstairs of the Wabasha Book Store. He produced a photograph of RACHELLE REYNOLDS which was taken a few years ago while she attended Woodland Hills in Duluth. Sgt. England advised that we should try and observe RACHELLE REYNOLDS performing and then confront her, requesting some

identification. He stated if she produced a false identification, she should be lodged at the Arrowhead Juvenile Center.

At approximately 2040 hours, Officers Ells and Thamm, of the Juvenile Bureau, and myself (Christensen), of the Special Investigations Unit, went to the Wabasha Book Store, #13 East Superior Street. Officers Ells and Thamm remained outside and I (Officer Christensen) went into the book store. There was a clerk in the downstairs area and I asked him if they had girls performing. He pointed to a door and said, "Through that door and upstairs". I then went to the upstairs area where there was another clerk. I asked him if they had girls performing and he said, "Yes", they did. He said that for $1.00 you got four tokens and you were to go into one of a number of small rooms, place the coins in the slot, and the panel covering the window would rise and you could observe the dancers. I purchased four tokens for $1.00 and then went to a room and entered. Upon placing my four tokens in the slot, the panel did rise and a female started to dance. She was dressed in panties and a sleeveless top. She had blonde hair and I knew she was not RACHELLE REYNOLDS. She came over to the window, stating she

was "NICKI", and that I needed to tip her $1.00 before she would dance. I gave her $1.00 nd she started to dance, partially removing her top, exposing her breasts, and then she rubbed her breast in a sexual manner. She then came back to the window and stated she would like me to meet her in the "rap" room. I then asked if there were any other dancers, at which time the panel covering the glass went back down.

I went back to the cashier/clerk and purchased eight more tokens and went back to the room. I placed four more tokens in the slot and again the panel went up and once again "NICKI", the blonde haired female, came out to perform. I once again asked if there were any other dancers, and within a short time she stopped dancing and another female entered. This female I recognized through the photograph as being RACHELLE REYNOLDS. The panel then closed once again and I inserted four more tokens and when the panel rose again, the female who I believed to be RACHELLE REYNOLDS came over to the window and told me I needed to tip her $1.00 before she would start dancing. I asked her what her name was and she said her name was "CHERYL". I gave her $1.00 and then she started to dance. She was

dressed in panties and a red top. Once she started dancing, she lowered her top below her breasts and began to rub her breasts, caressing and stoking them in what I believed to be a sexual manner. She then placed her right leg up alongside the window and then sliding her panties, exposed her vagina. She then with her left hand stroked her vagina in a sexual manner. She then came up to the window and asked me to meet her in the "rap" booth stated she would be there at nine o'clock. The panel then closed and I left the booth.

I went back downstairs and outside, and met Officers Ells and Thamm. I advised them that I did observe the 17-year-old female, and it was decided we would go back upstairs at approximately 2100 hours and confront her.

At approximately 2100 hours, I then entered the Wabasha Book Store and went back upstairs to the clerk. Officers Thamm and Ells entered within a few seconds. Officer Thamm remained downstairs getting information from the downstairs clerk, and Officer Ells and I spoke with the upstairs clerk. (For further information regarding the identity of the

clerks, see Officer Thamm's supplemental report.) We identified ourselves as Duluth Police officers and told him we needed to speak with the dancer named "CHERYL". He then buzzed the door for us and we entered the "employees only" area where we found the dancer who was later identified as VALERIE JOANNE SUNDIN, DOB 02-16-64, of 328 East 46th Street, Minneapolis, Minnesota.

We identified ourselves once again as Duluth Police officers to these two dancers and asked for some identification from RACHELLE REYNOLDS. She produced a Minnesota identification card in the name of CHERYL LYNN REYNOLDS, DOB 01-26-63, of 3908 - 113th Street, Bloomington, Minnesota 55438. I questioned RACHELLE REYNOLDS about the Minnesota identification card and she answered the questions correctly. I then gave the Minnesota identification card to Officer Ells who was going to call in a query through the computer. I then said to RACHELLE REYNOLDS, "You are not Cheryl, you are Rachelle, aren't you?", and she said, "Yes". I asked her how old she was and she said 17 years old. I asked her if CHERYL LYNN REYNOLDS was her sister and she said, "Yes". I

asked her if she had any other identification showing that she was RACHELLE ALAYNE REYNOLDS, and she said, "No", that her driver's license had been taken away. I told her she was under arrest for misrepresentation of age and that she would have to come with us. She was then allowed to dress. Before leaving, we went through her purse and found inside an address book with her name, RACHELLE REYNOLDS, and a few other items with her proper name. Prior to leaving, RACHELLE said she had over $800 in her car parked out back of the store. She asked if she could get it and we went with her to a silver Chevrolet Monte Carlo, Minnesota license 835-AGV. RACHELLE was unable to get into the car because the locks were frozen. We then transported RACHELLE REYNOLDS back to the Duluth Police Department where I interviewed her in the Special Investigations Unit office.

At approximately 2130 hours, I advised RACHELLE REYNOLDS of her rights per Miranda, which she stated she understood and was willing to talk to me. I asked her when she started dancing and she said that approximately ten days ago, she went to one of the book stores in the

Minneapolis area, the name of which she can't remember, but said it was at 741 South Lake in Minneapolis. She told one of the clerks she was looking for a job. She was then told to talk to a female whose first name she knew as "EVE", and "EVE" talked to her and asked for an I.D. card. RACHELLE said she showed "EVE" her Minnesota identification card in the name of CHERYL LYNN REYNOLDS and was then hired. She said she danced for the different book stores in the Minneapolis area, and on this past Monday, 05-01-89, she came to Duluth to dance at the Wabasha Book Store. I asked her where she got the Minnesota identification card and she said she took her sister's birth certificate and went and applied for the identification card, but the photo on it is of her.

I asked RACHELLE how much she made working for the book stores and she said they pay $1.50 an hour and the dancers can keep all their tips. I asked how much she has made since being in Duluth on Monday, and she said on Monday she worked eight hours and made $215 in tips. On Tuesday she worked eight hours and made approximately $150 in tips, on Wednesday she worked two hours and made approximately $75

in tips, and on Thursday she worked eight hours and during the day from 10 a.m. to 6 p.m. and made $185 in tips. She said that so far this day, Friday, for a little over two hours she had made $26 in tips. I asked RACHELLE how much she was making in the Minneapolis area and she said she was making approximately the same amount of money there.

I asked RACHELLE if she knew any of the people who worked at the Wabasha Book Store and she said when she came to Duluth, she went to one of the clerks, asked for a time card, filled it out, and then started working on Monday. She said she did not know any of the employees names and they were expecting her because "EVE" does all the hiring and scheduling for all the girls at all the book stores.

Officer Ells then came into the office advising he had just spoken over the telephone with a female who identified herself as EVE CASCIO, of the Newspaper Club, phone 825-1909, 224-5651, wanting to know what was happening with CHERYL. He said he told her what he could for now.

I asked RACHELLE how she got to Duluth and she said she came in the Monte Carlo which belongs to her friend, ROSS LOADER, of 3908 - 113th Street, Bloomington, Minnesota, and that was the car parked behind the Wabasha Book Store in the alley which contains approximately $800 she had spoken about earlier. I asked her where she has been staying since she has been in Duluth. She said she stays at an apartment owned by the Wabasha which is at 7th Avenue East and 4th Street. She said she pays $5 a day and all the dancers from the Cities stay there. She said currently staying there are "NICKI", "TIFFANI", and herself, and a female named "LISA" had been staying there also.

I asked RACHELLE if the people at the Wabasha Book Store here in Duluth asked for her I.D. when she came up and filled out the time card, and she said, "No", they didn't. I asked her once again if she was requested to show her I.D. when she applied for the job in Minneapolis and she said, "Yes", that "EVE" had asked for her I.D.

I asked RACHELLE where the money came from that was currently in the car and she said it was all from dancing and tips. She said when she

came up here from Minneapolis, she brought approximately $350 with her and she has earned he rest of that and spent approximately $300 since she has been here. She said she has done a lot of shopping and bought quite a bit of clothing.

I told RACHELLE that because of the money in the car and the location it was parked at, and also the fact that she didn't own it, we would tow it for safekeeping. She agreed that would be best.

The interview then ended at approximately 2210 hours. Officers Ells and Thamm transported her to the apartment at 7th Avenue East and 4th Street where she picked up some clothing and then transported her to the Arrowhead Juvenile Center where she was lodged. Officers Ells and Thamm also made arrangements with a squad to have the Monte Carlo towed for safekeeping.

DULUTH POLICE DEPARTMENT

WRITTEN STATEMENT

Date 05-05-89

Time 1116

Place AJC

I, Rachelle Reynolds, date of birth 4-16-77 and now residing at 9042 Hyland Creed Road have been advised of my rights:

1. To remain silent and not make any statements.
2. That anything I say can be used against me in Court.
3. That I have the right to talk to a lawyer and to have a lawyer with me during questioning, and that if I cannot afford a lawyer, one will be appointed to represent me.

I have read the above statements; I understand what they mean and I wish to give up these rights. I am willing to make a statement freely and voluntarily to Officers E. Thamm - Ells.

No promises or threats have been made to me.

Signatures/Rachelle Reynolds

"I had a boyfriend whos (sic) old girlfriend that (sic) danced and she made big bucks. And I needed money because I didn't live with my

parents & I didn't have a steady job. So I went to a bookstore to get a job. I told the clerk that I need a job, he called Eve. Eve said come back tomorrow when I am there. I went back. Showed her my I.D. She asked me if I danced before, I lied and said yes and I hang (sic) around to see what it was like. So I worked 4 nights. Then my dad hit me and I told Eve I could work in Duluth. So I came to Duluth. I took my sisters (sic) birth certificate to get a fake I.D. I went to Hennepin county R.R. ~~police~~ library. I had fake I.D.'s before. I did the same before. I had 3 I.D.'s taken before, I had one from a checks cashed. I showed them a birth certificate too. I got the I.D.'s to get into the bars. I used my sisters (sic) birth certificates. Janice who is 24 and Sheryls (sic) who is 26.

When I spoke to Eve she told me what terms of employment were. Which was be on time, no prositution (sic) R.R. ~~always~~ I was paid $1.50 per hour & I get to keep my tips. Eve made out our schedule. 5-6 I work 10 AM-2AM because Sonya was sick so I told her I would cover for her. R.R. ~~S~~ I get paid every Sunday. I get a check a week behind so I don't have one yet."

To the best of my knowledge this is a true statement.

Signature_____

RECEIPT

I have written and/or read the above statement consisting of ____ pages and have signed each page, corrections, if any bear my initials, and I have received one copy of this statement from:

_____

Witnessed_____Date_____Time_____

_____AM PM

Witnessed_____

_____

Signature for receipt of copy.

RR She asked about an I.D. card I should (sic) her mine, or Sheryls (sic). She said "I looked younger" & said "Oh". She asked for a social security number or card. I told her I have it at home & I would call her. I called her and gave Eve a phony one & a phony address.

Eve is 5'1, long dark brown hair, 8-1/2 months pregnant, 35 years old, brown eyes. I came in contact at chicago (sic) & lake street (sic) store. We went to different stores each night. I made about $1300-$1400 dollars each night. I averaged about $175 a night. RR

To the best of my knowledge this is a true statement.

Signature s/Rachelle Reynolds

RECEIPT

I have written and/or read the above statement consisting of 3 pages and have signed each page, corrections, if any bear my initials, and I have received one copy of this statement from: Officer E. Thamm

Witnessed s/Edward Thamm Date 05-06-89 Time 0004 AM PM

Witnessed s/John Ells

s/Rachelle Reynolds

Signature for receipt of copy."

Captioned Cited

OMNIBUS HEARING ORDER

The above-entitled matters came on before the above-named Court for an Omnibus Hearing on the 16th day of August, 1989. Appearing in behalf of plaintiff was John E. DeSanto, Assistant St. Louis County Attorney. Defendant John William Sarette (File #18413) appeared personally and with his attorney, Arthur Albertson. Defendant Eve White a/k/a Eve Cascio (File #18417) appeared personally and with her attorney, Randall T.B. (sic) Tigue; and defendant Ferris Jacob Alexander, Sr. (File #18420) appeared personally and with his attorney, Douglas Thomson.

The State submitted the issue of probable cause upon the reports contained in the instant files. There was no testimony offered by or in behalf of plaintiff and/or defendants. The sole Rasmussen issue related to a statement made by Defendant Sarette (File #18413) on May 25th, 1989, to Officer John Christensen of the Duluth Police Department. Defendant Sarette by and through his attorney, Mr. Arthur Albertson, did not make any constitutional challenge as to the admissability (sic) of said statement. The defendants requested the

opportunity to submit written briefs in support of their joint motions to dismiss the complaint against their respective clients on the grounds that Minnesota Statute Sec. 617.246 is unconstitutional on its face and unconstitutional as applied to their respective clients. Defendants also moved the Court to dismiss the charges against the respective clients on the grounds that there was insufficient probable cause to believe their client committed the offense charged.

The Court orally ruled that the statements made on May 25th, 1989, by Defendant Sarette (File #18413) to Officer Christensen were admissible over constitutional objection at the trial of Defendant Sarette. The Court entered provisional pleas of not guilty on behalf of each of the respective defendants. The Court in response to the request of plaintiff afforded plaintiff the opportunity to submit a written brief and memoranda before August 25th, 1989, and afforded the defendants the opportunity to reply within a period of one week thereafter. The issue of probable cause and the constitutionality of the statute in question were taken under advisement by the Court.

Upon the arguments of counsel, the written briefs and memorandum submitted, and upon the file and record herein, the Court

now makes the following:

FINDINGS OF FACT

1. The motion of each defendant regarding an insufficient showing of probable cause to believe that said defendant committed the crime charged is respectfully denied.

2. The following items of evidence shall be admissible against defendant John Sarette upon the trial of the above-captioned File #18413.

(a) The statements made on May 25th, 1989, by Defendant Sarette to Officer John Christensen of the Duluth Police Department.

3. That the motion of each of the defendants to dismiss the complaint against them is respectfully denied.

4. A plea of not guilty is hereby entered by the Court in behalf of each of the said defendants, and the within matters are set for trial.

Let the hereto attached Memorandum be made a part of this order.

Dated at Duluth, Minnesota

this 10 day of October, 1989.

BY THE COURT:

s/Jack L. Litman
Jack L. Litman

Judge of the District Court

MEMORANDUM

Each of the three above-named defendants is charged with a single count of Using a Minor In A Sexual Performance in violation of Minn. Stat. 617.246, subd. 2 with reference to subdivisions 1 and 5(1988) and 609.05. Defendants are accused of unlawfully promoting, employing, using, or permitting a minor to engage in posing or modeling alone or with others in a sexual performance, when the defendant knew or had reason to know that the conduct intended was a sexual performance. The definition of "sexual performance" includes a dance or other exhibition presented before an audience which depicts sexual conduct. "Sexual conduct" includes masturbation or lewd exhibitions of the genitals; and simulated or actual physical contact with the pubic area or breasts of a female indicating sexual stimulation or gratification when the depiction involves a minor.

Defendants now move for dismissal of the criminal complaints against them on the grounds that said statute is unconstitutionally overbroad and violates the right to due process of law. In addition, all defendants challenge sufficiency of probable cause to believe that they committed the offense charge.

The Minnesota Court of Appeals decided a case which challenged the unconstitutionality of the same statute. The Court ruled that the prohibition against using minors in sexual performances is not substantially overbroad or unconstitutionally vague. State v. Fan, No. CX-88-2467, slip opinion at 2 (Minn. App. Sept. 5, 1989).

In Fan, he defendant was convicted of employing and permitting a 14-year old to engage in a sexual performance. Fan owned and operated the Belmont Club which featured nude dancing. He was present when the minor auditioned and she was hired upon his approval. Fan did little to ascertain her actual age. The only identi- fication provided by the minor was an Unbank card which is summarily issued without requiring proof of age. The Court of Appeals affirmed Fan's conviction.

Facts

In this case, the minor involved (herein-after referred to as RAR) was born April 16, 1972. In April of this year, at the age of 17, she sought employment as a nude dancer and was hired by defendant White. At White's request, RAR presented an identification card issued by the State of Minnesota, bearing her picture and indicating her date

of birth as 01-26-63. At the time, White commented that RAR "looked younger." Apparently, RAR had used her older sister's birth certificate to acquire the false identification card.

At RAR's request, White scheduled her to perform at the Wabasha book store in Duluth. On Friday, May 5, 1989, the Duluth Police Depart-ment received a complaint that RAR was performing there. Upon investigation, one of the officers observed RAR perform. She was dressed in panties and a red top. As RAR danced, she lowered her top below her breasts and began to rub them in what the officer believed to be a sexual manner. With her right leg placed along the viewing window, RAR slid her panties to the side exposing her vagina. She then stroked her vagina with her left hand. Shortly thereafter, RAR was arrested by Duluth police officers.

Defendant White, who hired RAR, is employed by defendant Alexander. Alexander owns the adult book store where RAR was hired and the Wabasha adult book store where she was ultimately arrested. Defendant Sarette manages the Wabasha book store.

Overbreadth

Defendants argue that elimination of the scienter requirement

with respect to a minor's age renders the statute unconstitutionally overbroad. Yet, it is well established that overbreadth scrutiny is limited, particularly when conduct rather than pure speech is involved. New York v. Ferber, 458 U.S. 747, 770 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). A statute will not be held facially invalid as long as its legitimate reach "dwarfs its arguably impermissible applications." Ferber, 458 U.S. at 774.

In Fan, the Minnesota Court of Appeals concluded that Minn. Stat. 617.246 permissibly prohibits the use of minors in sexual performances. Fan, slip opinion at 5. Any possibility that the statute might abrogate valid first amendment applications was characterized as marginal. Id. at 5-6. The Fan Court concluded that any actual infringement of constitutional rights should be decided on a case by case basis. Clearly, no such infringement has occurred here. RAR's performance constituted neither artistic nor educational expression which might otherwise be protected.

Due Process

Defendant also argue that excluding knowledge of the minor's age as an element of the offense imposes strict liability in violation of

the right to due process. This argument, however, was rejected in Fan.

Due process analysis requires a balancing of competing interests. Here, the interest of requiring mens rea must be weighed against the interest of protecting children from sexual abuse. Interpreting the legislature's express exclusion of a mistake-of-age defense as a statement of public policy, the Court of Appeals found the latter interest more compelling.

Defendants also argue that the Fan Court limited the holding to the facts of that case. Although the facts of the instant case are distinguished from those in Fan, this Court interprets any language in the opinion which purports to narrow its application as mere dicta.

Probable Cause

A defendant has the right to a deter-mination of probable cause which protects him from being unjustly compelled to stand trial. Minn. R. Crim. P. 11.03; State v. Florence, 306 Minn. 442, 454, 239 N.W. 2d 892, 900 (1976), modified, State v. Rud, 359 N.W. 2d 573 (Minn. 1984). The standard for granting a motion to dismiss for lack of probable cause is whether "the facts appearing on the record, including reliable hearsay, would preclude the court from granting a motion for a directed verdict

of acquittal at trial." State v. Diedrich, 410 N.W. 2d 20, 22 (Minn. App. 1987). The standard for granting a directed verdict requires "the determination of whether, as a matter of law, the evidence is sufficient to present a fact question for the jury's consideration." Paradise v. City of Minneapolis, 297 N.W. 2d 152, 156 (Minn. 1980).

Based upon the complaints, the police reports, and statements of the witnesses, the Court concludes that the State of Minnesota has offered sufficient evidence to show with reasonable probability that each defendant committed the offense charged.

Defendant White hired RAR, scheduled her performances at the Wabasha book store, and informed RAR that she was not to engage in prostitution. Defendant Sarette managed the Wabasha book store, was aware of the occurrence of nude dancing, and placed advertisements in the local newspaper promoting the performances. Defendant Alexander owns the adult book store in Minneapolis where RAR was hired, owns the Wabasha adult book store in Duluth where she was arrested, signed her pay checks, and paid for the local newspaper promotions. Furthermore, with their extensive experience in the adult entertainment industry, all of the defendants were keenly aware that the kind of

conduct for which RAR was being hired was a sexual performance.

Consequently, defendants' motions to discuss for lack of probable cause and upon grounds that Minn. Stat. 617.246 is unconstitutional are respectfully denied.

J.J.L.

Caption Cited

NOTICE OF MOTION

TO: The above-named Plaintiff, and Mr. John DeSanto, Assistant County Attorney, 100 North 5th Avenue West, Suite 501, Duluth, Minnesota 55802, its attorney:

PLEASE TAKE NOTICE that the above-named Defendant, by the undersigned, will bring the attached motion for hearing before the Honorable Jack Litman, Judge of the above-named Court, in his courtroom at the St. Louis County Courthouse, Duluth, Minnesota, on February 23, 1990, at 9:00 a.m., or as soon thereafter as counsel can be heard.

s/_____
Randall D. B. Tigue
Attorney for Defendant
Eve White
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn.Sup.Ct.Lic. No. 110000

Dated: February 5, 1990.

Caption Cited

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

The above-named Defendant, by the undersigned, hereby moves this Court, for an order, pursuant to Rule 26.03, Subd. 17(3) of the Minnesota Rules of Criminal Procedure, granting to Defendant a judgment of acquittal notwith-standing the verdict on the ground that the undisputed evidence plainly established Defendant's entitlement to a defense of reasonable mistake as to fact, barring her conviction as a matter of law.

In the alternative, Defendant moves for an order, pursuant to Rule 26.04, Subd. 1 of the Minnesota Rules of Criminal Procedure granting to Defendant a new trial on the following grounds:

I. The verdict was not justified by the evidence.

II. The court committed errors of law at trial, justifying a new trial, to-wit: refusal to instruct the jury as to reasonable mistake of

identity as a defense.

The foregoing motion shall be based on the attached memorandum of law, and upon the files, exhibits, and minutes of the Court.

s/_____
Randall D. B. Tigue
Attorney for Defendant
Eve White
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn.Sup.Ct. Lic. No. 110000

Dated: February 5, 1990.

Caption Cited

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EVE WHITE'S MOTION FACTS

Defendant Eve White in the above-entitled matter was convicted by a jury on January 29, 1990 of a single count of using a minor in a sexual performance, in violation of Minnesota Statutes Section 617.247, Subd. 2, which provides, in pertinent part, as follows:

> "It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual per-formance if the person knows or has reason to know that the conduct intended is a sexual performance."

The term "minor" is defined in Section 617.246, Subd. 1(b) as "any person under the age of 18." The term "sexual performance" is defined in Section 617.246, Subd. 1(d) as follows:

> "'Sexual performance' means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e)."

The term "sexual conduct" is further defined in clause (e) of the same section as follows:

> "'Sexual conduct' means any of the following if the depiction involves a minor:

(i) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between human beings and an animal.

(ii) Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in under-garments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(iii) Masturbation or lewd exhibition of the genitals.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between human beings and animals in an act of apparent sexual stimulation or gratification."

Subdivision 5 of the same section also provides as follows:

"Neither consent to sexual per-formance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section."

The undisputed evidence at trial was that Defendant Eve White hired one Rachelle Reynolds, age 17, to work as a nude dancer in adult book-stores in both the City of Minneapolis and the City of Duluth. The further undisputed testimony was that Defendant hired Ms. Reynolds only because Ms. Reynolds successfully passed herself off as being, not Rachelle Reynolds, age 17, but rather Cheryl Reynolds,

Rachelle Reynolds' 26-year-old sister. The undisputed testimony was that Rachelle Reynolds did so by stealing Cheryl's birth certificate, and taking that birth certificate to the Hennepin County Library, wherein she managed to convince state officials that she was her 26-year-old sister, on the basis of the birth certificate, and had issued to her a Minnesota State Identification Card bearing Rachelle's photograph, but also bearing her sister Cheryl's name and date of birth. The testimony at trial was that she so managed to convince the state that she was her 26-year-old sister on at least two occasions.[1]

On one occasion, the false identification card was mailed to Rachelle Reynolds' home address and confiscated by her father. On the occasion which led to Defendant Eve White's prosecution, however, Rachelle Reynolds guarded against that by having the false identification sent to the address of a friend, Ross Loader, who was a co-participant in the fraud.

---

[1]The Court excluded from evidence testimony as to the exact number of prior occasions in which Rachelle Reynolds perpetrated the above-mentioned fraud on the State of Minnesota. However, her post-arrest statement, considered by the Court in connection with Defendants' pre-trial motions to dismiss, indicated that she did so on at least three occasions.

Thus, Defendant Eve White hired Rachelle Reynolds, not out of a mistaken belief that Rachelle Reynolds was 26 years of age, which would have been a mistake of age, prohibited as a defense by statute, but rather because she believed Rachelle Reynolds was in fact Cheryl Reynolds, another person, who happened to be 26 years of age. Equally important was that the representation to Defendant that the person seeking employment was not Rachelle Reynolds, but rather Cheryl Reynolds, was made not only by Rachelle Reynolds, but was also made by the State of Minnesota, which issued Rachelle Reynolds an official State of Minnesota Identification Card declaring her to be Cheryl Reynolds, age 26.

At the end of the state's case-in-chief, Defendant Eve White moved for a judgment of acquittal, on the ground that the evidence established the presence of a reasonable mistake of fact defense, to-wit: a mistake as to identity, not a mistake as to age. The motion was denied.

Defendant White further requested that while the jury be instructed that mistake as to age is not permissible as a defense, other mistake as to fact would be a defense. The requested instructions were

denied.

On the basis of these facts, Defendant moves for judgment of acquittal, notwithstanding the verdict, or, in the alternative, for a new trial.

ARGUMENT

I. DEFENDANT IS ENTITLED TO A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT, GIVEN THE OBVIOUS PRESENCE OF A DEFENSE AS TO MISTAKE OF IDENTITY AS OPPOSED AS TO MISTAKE AS TO AGE.

A. MINNESOTA STATUTES SECTION 617.246, SUBD. 5 DOES NOT BAR THE DEFENSE AS TO MISTAKE OF IDENTITY, AS OPPOSED TO MISTAKE AS TO AGE.

Although there appear to be no Minnesota appellate court decisions on point, it has long been the law throughout the United States that a reasonable mistake as to fact constitutes a defense to a criminal charge, where a mistake as to fact would negate the criminal state of mind necessary to the commission of the offense. See, for example, 22 C.J.S. Criminal Law, Section 93, and the cases cited therein. According to those cases, in order to be a valid defense, the mistake of fact must be honest and reasonable, must be about a matter of fact, and serve to negate the kind of culpability required for the commission of the offense. For example, one who purchases a package of powdered

sugar, believing it to contain powdered sugar, when it in fact contains heroin, does not commit the offense of possessing heroin, so long as his mistake of fact is honest and reasonable, and goes to the culpability required for the com-mission of the offense.

In fact, Minnesota Statutes Section 617.246, Subd. 5 itself appears implicitly to recognize the existence of a mistake of fact defense, since it specifically excludes one particular mistake of fact defense, to-wit: mistake as to a minor's age.

The mistake of fact defense raised by Defendant Eve White in the instant case, however, is not mistake of fact as to Rachelle Reynold's age; rather, it is a mistake as to her identity. Defendant hired Rachelle Reynolds, not on the mistaken belief that Rachelle Reynolds, age 17, was in fact age 26; rather, she hired Rachelle Reynolds upon the mistaken belief that she was not Rachelle Reynolds at all, but rather was Cheryl Reynolds, who was indisputably 26 years of age at the time of the incident giving rise to Defendant's prosecution. Nothing in either the language of the statute itself, nor in the leading case con-struing the statute, State v. Fan, 445 N.W. 2d 243 (Minn. App. 1989), reviewed denied (1989), compels a different result. In Fan, the Defendant hired

a 13-year-old minor to engage in nude dancing, without requiring any identi-fication at all. Before the individual was put to work, Defendant was shown an Unbank Card, used for check cashing identification, correctly identifying the minor as to name, but falsely listing her age as 18.[2] Thus, Fan was a pure mistake as to age case, without involving a mistake of identity in any manner whatsoever.

Moreover, recognizing a mistake of identity, as opposed as to a mistake of age, defense would clearly be consistent with the purpose underlying Minnesota Statutes Section 617.246, Subd. 5. In Fan, the court stated that purpose to be "a more thorough investigation of [erotic] dancers' ages (footnote omitted)." Id. at 247.

In his dissenting opinion in United States v. United States District Court, 858 F. 2d 534, 546 (9th Cir. 1988), Judge Beezer in urging the elimination of the mistake of age defense, asserted the following:

> "A pornographer acts at his peril if he fails to complete an accurate investigation of the age of the subjects he

---

[2]See 445 N.W. 2d at 245. The court also pointed out that the Unbank card was "obtained by filling out a form for which no documentation was required." Id. at 245.

> employs to produce sexually explicit material. An accurate investigation could be based upon reputation, first-hand testimony, and especially, documents. Documents establish age. While documents may be counterfeited, the originals exist somewhere. It would be simple for a pornographer to write his subject's birthplace for a certified copy of the subject's birth certificate. A pornographer might even go see the original himself. By obtaining proof in this fashion, or a pornographer could eliminate all doubt about the subject's age."

In point of fact, the evidence in this case plainly established that had Defendant Eve White conducted such an investigation as to Cheryl Reynolds, whom she believed she was hiring, the investigation would have done nothing but con-firm her belief that she was hiring someone over the age of 18. The false identification was obtained as a result of a stolen birth certificate. Had Eve White demanded a certified copy of Cheryl Reynolds' birth certificate, or even seen the original, it would have done nothing but reinforce her belief as to the age of the person she was hiring. This plainly indicates that while a mistake as to age should be eliminated as a defense, there was no legislative intent to eliminate the defense as to mistake of identity.

Moreover, a mistake of identity defense plainly comports with fundamental rules of statutory construction embodied in Minnesota

Statutes Section 645.17(1), in which the Legislature declared that it "does not intend a result that is absurd, impossible of execution, or unreasonable..."

In a virtually identical situation, the Minnesota Supreme Court has held a similar mistake of fact defense to be compelled as a matter of statutory construction. In State v. Neisen, 415 N.W. 2d 326 (Minn. 1987), the Minnesota Supreme Court reversed a decision of a Court of Appeals holding that a reasonable mistake of age defense was not a defense to a criminal charge of selling liquor to a minor, even though the legislature had repealed statutory language specifically permitting such a defense. Among the reasons set forth by the legislature in construing the statute so as not to eliminate a mistake of age defense was the fact that the elimination of such a defense would be absurd and unreasonable. The Minnesota Supreme Court stated:

> "We must keep in mind...that the legislature does not intend an unreasonable result and that the legislature intends an entire statute to be effective and certain. Minnesota Statutes Section 645.17 (1986). Finally, we are guided by the public policy that a criminal liability, particularly gross misdemeanor of felony liability, is to be imposed for conduct unaccompanied by fault, the legislative intent to do so should be clear." Id. at 329.

Clearly it is far more absurd and unjust to impose felony liability

and the label of "child pornographer" upon a Defendant who reasonably believes he is hiring, not the person actually seeking employment, but her 26-year-old sister, than it is to impose gross misdemeanor liability for selling liquor to a minor, being reasonably mistaken as to the minor's age. Clearly Neisen stands for the proposition that the imposition of criminal liability, in the absence of mens rea, should be narrowly limited. The legislature, in enacting Section 617.246, Subd. 5, eliminated only mistake as to age, not mistake as to identity as a defense.

It was plainly error for the court to construe the statute to eliminate a mistake as to identity, to grant a judgment of acquittal based upon that defense.

B. THE MISTAKE OF IDENTITY DEFENSE IS CONSTITUTIONALLY COMPELLED UNDER THE FACTS OF THE INSTANT CASE, WHERE THE STATE OF MINNESOTA ITSELF AFFIRMATIVELY PARTICIPATED IN THE MISREPRESENTATION RELIED UPON BY DEFENDANT LEADING TO HER PROSECUTION.

In determining the availability of a mistake of a mistake of identity defense, a critical factor is that Rachelle Reynolds did not act alone in misrepresenting her identity to Defendant Eve White. The State of Minnesota was an active and crucial participant in that misrepresentation. In granting employment to Rachelle Reynolds, Defendant

Eve White plainly relied upon an identification card issued by the State of Minnesota, plainly for the purpose of establishing an individual's identity and date of birth. The issuance of the card is mandated by Minnesota Statutes Section 171.07, Subd. 3, which provides as follows:

> "Upon payment of the required fee the department [of Public Safety] shall (emphasis supplied) issue to every applicant therefor a Minnesota Identification Card. The department may not issue a Minnesota identifi-cation card to a person who has a driver's license, other than an instruction permit. The card must bear a distinguishing number, assigned to the applicant, a colored photograph, the full name, date of birth, residence address, a description of the applicant in a manner the commission deems necessary, and a space upon which the applicant shall write the usual signature and date of birth of the applicant with pen and ink.
>
> Each Minnesota Identification Card must be plainly marked 'Minnesota Identification -- not a driver's license.' The fee for a Minnesota Identification Card issued to a person who is mentally retarded, as defined in Section 252.A.02, Subdivision 2 is 50 cents."

Plainly, the statute is intended for the purpose of according every person who is not a licensed driver a state-sanctioned method of establishing his identification and date of birth. In fact other Minnesota statutes specifically establish the Minnesota Identi-fication Card as sufficient proof of identification and age to qualify for senior citizens

benefits,[3] and for the purpose of purchasing liquor.[4]

Plainly then, when the State of Minnesota issued Rachelle Reynolds an official identification card, identifying her as Cheryl Reynolds, age 26, it did so plainly for the purpose of permitting her to establish her identity and age for all lawful purposes, including employment. Equally clear is the fact that due process of law precludes the state, as a matter of law, from imposing criminal liability upon Defendant Eve White for her reliance upon the state's own misrepresentations.

In Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed. 2d 1344 (1959), the United States Supreme Court reversed contempt convictions for witnesses appearing before the Ohio Un-American Activities Commission, in a situation in which the chairman and members of the commission affirmatively represented that the witnesses had a privilege not to answer questions they believed would incriminate them. Despite exercising the privilege commission members had indicated was available

---

[3]See Minnesota Statutes Section 171.07, Subd. 3a.

[4]See Minnesota Statutes Section 340A.53.

to them, the Defendants were prosecuted under the theory that the Ohio Immunity Statute removed the threat of criminal prosecution, thus making a self-incrimination claim unavailable to them. In holding it to be a violation of the due process to convict Defendants under these circumstances, the United States Supreme Court stated:

> "[H]ere the chairman of the commission who clearly appeared to be the agent of the state in a position to give such assurances apprised three of the appellants that the privilege in fact existed, and by his behavior toward the fourth obviously gave the same impression. Other members of the commission and its counsel made statements which were totally inconsistent with any belief in the applicability of the immunity statute, and it is fair to characterize the whole conduct of the inquiry as to the fourth, as identical with what it would have been if Ohio had no immunity status at all. Yet here the crime said to have been committed by the appellants, as defined by the State Supreme Court, was simply that of declining to answer any relevant question on the ground of possible self-incrimination. This was because the Court held that the Ohio Immunity Statute automatically removed any basis for a valid claim of privilege, which generally exists under Ohio law (footnote omitted).
>
> [Citation omitted.] Accordingly, any refusal to answer, based on a claim of privilege, was said to constitute the offense. While there is no suggestion that the commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the commission acted as it did would be to sanction the most indefensible sort of entrapment by the state --convicting a citizen for exercising a privilege which the state clearly had told him

was available to him." 360 U.S. at 437-438, 3 L.Ed. 2d at 1355.

Similarly, in Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 2d 487, rehearing denied, 380 U.S. 926, 85 S.Ct. 879, 13 L.Ed. 2d 814 (1965), the Court reversed the conviction of a civil rights leader who was convicted of violating an East Baton Rouge, Louisiana ordinance prohibiting picketing "near a courthouse." The facts giving rise to the arrest were that the leader had conducted a demonstration approximately 101 feet from the courthouse, across the street, in a location for which permission to picket had been specifically granted by city officials, including the police chief. The Court held, relying on Raley v. Ohio, supra, that the permission granted by the highest police officials to hold the demon-stration where it was held constituted a representation that holding the demonstration at that location did not constitute demonstrating "near" a courthouse, within the meaning of the ordinance.

Similarly, when the State of Minnesota represented to Defendant Eve White that the person she was hiring was Cheryl Reynolds, age 26, it should similarly be barred, as a matter of law, from criminally prosecuting Defendant Eve White from relying on that

misrepresentation.

Obviously, nothing in State v. Fan, supra, 448 N.W. 243 (Minn. App. 1989, reviewed denied (1989), compels a contrary result. As already noted, supra, the only identification presented by the minor in that case was an Unbank Card, not an official State of Minnesota identification.

II. IN THE ALTERNATIVE, DEFENDANT SHOULD BE ACCORDED A NEW TRIAL.

Even assuming Defendant were not entitled to a judgment of acquittal notwithstanding the verdict, based upon a mistake as to identity defense, the availability of that defense should at least compel the granting of a new trial, wherein the defense could be presented to the jury, by way of both jury instruction and argument, something Defendant was precluded from doing by the rulings of the Court in this case.

CONCLUSION

For all of the foregoing reasons, Eve White's motion for judgment of acquittal, notwithstanding the verdict should be granted. In the alternative, Defendant should be awarded a new trial, at which she should be able to present to a jury the defense of mistake as to identity.

Respectfully submitted,

s/_____
Randall D. B. Tigue
Attorney for Defendant
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn.Sup.Ct. Lic. No. 110000

Dated: February 6, 1990.

Caption Cited

SYLLABUS

Excluding mistake of age as a defense to prosecution for use of minors in sexual performances does not invalidate Minn. Stat. § 617.246 (1988) on first amendment or due process grounds.

Affirmed.

Considered and decided by Short, Presiding Judge, Lansing, Judge, and Gardebring, Judge.

OPINION

LANSING, Judge

In State v. Fan, 445 N.W. 2d 243 (Minn. App. 1989), pet. for rev. denied (Minn. Oct. 31, 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1480 (1990), we upheld the constitutionality of Minn. Stat. § 617.246, prohibiting the use of minors in sexual performances, against general first amendment and due process claims. In this appeal, Eve White specifically challenges the constitutionality of the statute's exclusion of mistake of age as a defense.

FACTS

A St. Louis County jury convicted Eve White of using 17-year-old R.A.R. to engage in a sexual performance. The facts surrounding

Eve White's arrest and conviction are undisputed. White, the manager of several adult bookstores, hired 17-year-old R.A.R. to perform as a nude dancer on a bookstore dance floor. White testi-fied that she knew performers must be at least 18 years of age but mistakenly believed that R.A.R. was 26 years old.

White based her mistaken belief on R.A.R.'s presentation of a Minnesota identification card falsely identifying R.A.R. as her 26-year-old sister. White asked R.A.R. to repeat the infor-mation on the identification card and compared R.A.R.'s signature on her W-4 form with her signature on the card. She also asked her for additional identification and a social security number. R.A.R. said she did not have additional identification and that she had left her social security card at home. R.A.R. later telephoned White and gave a false social security number. White did not ask to see R.A.R.'s social security card after hiring her. White does not dispute the sexually explicit nature of R.A.R.'s performance or deny knowledge of its character and content.

Adhering to the statute over White's objection, the trial court refused to instruct the jury that a good faith mistake of fact constituted a defense to the charges. White brought post-trial motions challenging

the constitutionality of the statute and the court's preclusion of a defense based on mistake of age.

ISSUES

1. Does the preclusion of a mistake of age defense to Minn. Stat. § 617.246 imper-missibly constrain the first and fourteenth amendments to the United States Constitution?

2. Did the trial court incorrectly apply Minn. Stat. § 617.246, subd. 5 to exclude a mistake of identity?

ANALYSIS

I

The United States Supreme Court, in analyzing a New York statute[1] prohibiting the same conduct as Minn. Stat. § 617.246[2],

---

[1]N.Y. Penal Law § 263.15 (McKinney 1980).

[2]The statute provides in relevant part:

Subdivision 2. Use of Minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Subdivision 5. Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this

declared the New York statute valid against a first amendment challenge. New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed. 2d 1113 (1982). Ferber provided the basic authority for upholding Minn. Stat. § 617.246 against earlier constitutional challenges. State v. Fan, 445 N.W. 2d 243 (Minn. App. 1989), pet. for rev. denied (Minn. Oct. 31, 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1480 (1990). Because the conduct of the promoter in Fan differs somewhat from Eve White's conduct, we undertake a fuller analysis of the overbreadth doctrine and the due process clause as they relate to Minnesota's preclusion of the defense of mistake of age.

The first amendment is not violated by a state's prohibiting the use of a minor in a sexual performance, whether or not the performance is obscene, because child pornography is not entitled to first amendment protection. Ferber, 458 U.S. at 763-64, 102 S. Ct. at 3358. Even though the New York statute may suppress some protected expression, the court upheld its constitutionality because it is not substantially overbroad. Id. at 773-74, 102 S. Ct. 3363. White contends that the differences between the New York and Minnesota statutes undercut

---

section.

Ferber's precedential effect on her overbreadth challenge to the Minnesota statute.

The Minnesota and New York statutes differ in a significant respect. Under the Minnesota statute, White did not have available the defense that she "in good faith reasonably believed the person appearing in the [sexual] performance was [not a minor]." See 39 N.Y. Penal Law § 263.20 (McKinney 1980). Essentially, White's constitutional challenge asks whether the unavailability of the mistake of age defense, leading to the exclusion of her evidence of a good faith attempt to determine age, requires a different constitutional analysis or result from Ferber.

The relationship between a criminal act and the mental state of the person charged with the crime provides the rational basis for our system of criminal prosecution. See Morrissette v. U.S., 342 U.S. 246, 72 S. Ct. 240 (1952); Dennis v. United States, 341 U.S. 494, 500, 71 S. Ct. 857, 862 (1951). However, as we recognized in Fan, the existence of mens rea is not consti-tutionally mandated. Fan, 445 N.W. 2d at 246-47 n.3. States may create strict liability by defining criminal offenses without an element of scienter. See Smith v. California, 361 U.S. 147, 150, 80 S. Ct. 215, 217 (1959).

A well-established body of case law upheld statutes that exclude mistake of age as a defense to sexual conduct between adult and a child under the statutory age of consent. See State v. Morse, 281 Minn. 378, 161 N.W. 2d 699 (1968); State v. Silva, 53 Haw. 232, 491 P.2d 1216 (1971); State v. Stiffler, 117 Idaho 405, 788 P.2d 220 (1990); Toliver v. State, 267 Ind. 575, 371 N.E.2d 452 (1978); Commonwealth v. Miller, 358 Mass. 521, 432 N.E.2d 463 (1982); State v. Moore, 105 N.J. Super. 567, 253 A.2d 579 (1969); State v. Randolph, 12 Wash. App. 138, 528 P.2d 1008 (1974). But see People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964); State v. Guest, 583 P.2d 836 (Alaska 1978). This exclusion has also been upheld in forbidding interstate transportation of persons to engage in immoral practices. See U.S. v. Hamilton, 456 F.2d 171 (3d Cir.), cert. denied, 406 U.S. 947, 925 S. Ct. 2051 (1972).

An additional body of case law has upheld strict liability offenses in the area of public welfare, including food and drug legislation. See, e.g., United States v. Freed, 401 U.S. 601, 91 St. Ct. 1112 (unregistered hand grenades), reh'g denied, 403 U.S. 912, 91 S. Ct. 2201 (1971); United States v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134 (adulterated

drugs), reh'g denied, 320 U.S. 815, 64 S. Ct. 367 (1943); United States v. Behrman, 258 U.S. 280, 42 S. Ct. 303 (1922) (Narcotics Act violations); United States v. Balint, 258 U.S. 250, 42 S. Ct. 301 (1922) (sale of narcotics covered by the Narcotics Act).

As these cases illustrate, there is no absolute, constitutional prohibition on imposing strict criminal liability. However, none of these cases specifically address the first amendment issues raised by White. Because first amendment attacks on overly broad statutes may be premised on predictable as well as personal violations of constitutional rights, we must analyze the statute's effect on the protected speech or conduct of others as well as White. See Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L.Ed. 2d 830 (1973).

The overbreadth doctrine narrows as it moves from "pure speech" toward expressive conduct. Id. at 614-15, 93 S. Ct. at 2917. Recognizing that states have greater power to regulate expressive conduct, the Supreme Court has determined that, in such cases, a constitutional infirmity caused by overbreadth must not only be real, but substantial. Id. at 615, 93 S. Ct. at 2918.

The United States Supreme Court and the Minnesota Supreme

Court have held that nude dancing in some circumstances is a form of constitutionally protected expression. See California v. LaRue, 409 U.S. 109, 93 S. Ct. 390 (1972); Dorn v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561 (1975); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176 (1982); Koppinger v. City of Fairmont, 311 Minn. 186, 298 N.W. 2d 708 (1976).[3] White contends that Minnesota's imposing criminal liability for promotion of sexual performances of minors, irrespective of a good faith mistake, will eliminate all hiring for nude dancing, despite its constitutional protection.

In evaluating White's claim to overbreadth, we note first that, by removing the mistake of age defense, the Minnesota legislature did not extend the reach of the statute into a larger area of protected first amendment conduct. The statute specifically requires that a person subject to its enforcement must know or have reason to know that the conduct intended is a sexual performance. Minn. Stat. § 617.246, subd.

---

[3]For a comprehensive history of nude dancing as expressive activity, compare Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir.), cert. granted subd. nom., Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S. Ct. 38 (1990), with Walker v. City of Kansas City, Missouri, 911 F.2d 80 (arguing that nude dancing is not protected, expressive activity), reh'g denied, ___ F.2d ___ (8th Cir. 1990).

2. The Ferber court referred to this aspect of knowledge when it emphasized:

> As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

Ferber, 458 U.S. at 765, 102 S. Ct. at 3358.

The specific effect of removing the mistake of age defense is to put the promoter of a sexual performance at greater peril. Although the severity of the penalty factors into the overbreadth analysis, it does not compel a finding that the statute is overbroad. The standard remains the same as that established in Broadrick; overbreadth must be real and substantial.

Neither Broadrick nor Ferber identify a specific test to apply in determining substantial overbreadth. The term "substantial" obviously entails the amount of protected conduct that may be inhibited and the number of instances in which the inhibition would occur. Determining what is lost by the inhibition and what steps are available to ameliorate the inhibition are other important considerations.

The Ferber court used a comparative evalu-ation, reasoning that the reach of the New York statute is directed at the hard core of child

pornography and that the legitimate sweep of the statute "dwarfs its arguably impermissible applications." Ferber, 458 U.S. at 773, 102 S. Ct. at 3363. Ferber noted that some protected expression, ranging from medical textbooks to pictorials in the National Geographic could fall prey to the statute. In this regard, the Minnesota statute is no more punitive than the New York enactment because Minnesota does not prohibit the defense of mistake of age in prose-cutions for possession or distribution of pictorial representation of sexual conduct involving a minor. Minn. Stat. § 617.247 (1988).[4]

The additional overreach of Minnesota's Statute is the inhibition on adult nude dancing. Because age can be determined to some extent by observation of the individual and examination of original

---

[4]This distinction addresses to some extent the reservations expressed in the Ninth Circuit Court of Appeals' holding that precluding a mistake of age defense invalidated the Federal Child Protection Act, 18 U.S.C. § 2251. United States v. U.S. District Court for Central District of California, 858 F.2d 534, 540-43 (9th Cir. 1988). It is also significant that the federal act does not explicitly eliminate the defense of mistake of age. In a 2-1 opinion, the Ninth Circuit concluded that Congress had deliberately deleted such a provision. A specific statutory provision precluding a mistake of age defense presents a different set of facts which can result in a different holding. See, e.g., Comment, United States v. United States District Court (Kantor): Protecting Children from Sexual Exploitation or Protecting the Pornography Producer, 20 Pacific Law Journal 1343 (1989).

identification documents, all adult nude dancing would not be suppressed. White's initial response to R.A.R.'s identification was that R.A.R. looked younger, but White then accepted R.A.R.'s excuse that she had left her social security card at home. The suppressive affect would be greatest in the age group closest to 18 because visual confirmation does not provide as reliable a check to forged identity.

We do not deny the harshness of the statute as it applies to promoters of nude dancing. The Minnesota legislature has chosen to place a heavy burden on those who hire individuals to perform in sexual performances, requiring them to make a thorough, perhaps exhaustive investi-gation of their performers' ages. However, sexual exploitation of children has historically provoked strong regulation. As the Eighth Circuit reasoned in a case prohibiting the use of children in the distribution of a controlled substance, to permit a defense of lack of knowledge of the child's age would allow dealers "to close their eyes as to the age of the minors who become part of the operation, without feat of reprisal." U.S. v. Carter, 854 F.2d 1102, 1109 (8th Cir. 1988).

Despite the severity of excluding a good faith defense of mistake of age, we conclude that the statute is not unconstitutionally over-broad.

We reach this conclusion because the statute affects expressive conduct rather than speech, contains a scienter requirement for the content of the performance, and potentially deters only a limited amount of conduct.

II

White's due process challenge to Minn. Stat. § 617.246 is less clearly defined, but rests generally on the precept that imposing strict criminal liability on White, who lacked the requisite knowledge to avoid the criminality of her act, violates White's state and federal due process rights. These arguments are partially answered by the cases upholding the exclusion of mistake of age defenses in sexual misconduct prosecutions and transportation of persons for immoral purposes. White cites four additional cases as authority for her due process arguments.

White's federal due process argument is premised on the holdings of Morissette v. U.S., 342 U.S. 246, 72 S. Ct. 240 (1952) and Liparota v. U.S., 471 U.S. 419, 105 S. Ct. 2084 (1985). In Morissette, the Supreme Court refused to construe a newly-recodified larceny statute to eliminate proof of criminal intent when such intent was not specifically required by the statute. Similarly, in Liparota, the Supreme

Court held that, absent indication of a contrary purpose in the language or the legislative purpose of the statute, a criminal statute will be construed to require a mens area. The Minnesota statute, however, is not silent on the mistake of age defense; it specifically pre-cludes it. The clear legislative exclusion distinguishes White's circumstances from Morissette and Liparota.

The same distinction applies to the Minnesota cases that White advances as authority for the state due process violation. In State v. Neisen, 415 N.W.2d 326 (Minn. 1987), the supreme court declined to eliminate the "carding defense" to the liquor sales statute. The court stressed that to impose criminal liabilities for conduct unaccompanied by fault, "the legislative intent to do so should be clear." Id. at 329. The legislature's intent in section 617.246, subd. 5 is clear.

White also relies on State v. Guminga, 395 N.W.2d 344 (Minn. 1986), in which the court invalidated a statutory provision imposing vicarious liability on an employer for an employee's illegal liquor sale. We do not read Guminga as broadly as White recommends. White's responsibility was direct rather than vicarious and is not unconstitutional under Guminga. White has failed to establish a due process violation of

either the state or federal constitutions.

III

White argues that her proferred defense at trial was improperly excluded because she hired R.A.R., not on the mistaken belief that R.A.R. was 26, but on the mistaken belief that R.A.R. was her sister who was indisputably 26 years old. This distinction between mistake of age and mistake of identity is more verbally facile than legally significant. White acknowledged that she was not concerned about the true identity of the performers, but only their age. it is highly unlikely that the Minnesota Legislature intended that its express prohi-bition of a mistake of age defense could so easily be defeated by simply calling such a defense a mistake as to identity.

We also reject White's final due process argument that the state may not penalize her for relying on R.A.R.'s Minnesota identification card. Prosecution may be precluded where actions are taken in reliance on certain repre-sentations. See Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257 (1959) (affirmative representation that the witnesses had a privilege not to answer incriminating questions invalidated contempt conviction); Cox v. Louisiana, 379 U.S. 559, 85 S. Ct. 476 (city officials' permission

to picket in an area defeated a prosecution for prohibited picketing), reh'g denied, 380 U.S. 926, 85 S. Ct. 879 (1965); United States v. Brady, 710 F. Supp. 290 (D. Colo. 1989) (state court judge's indication that defendant could possess a firearm invalidated unlawful possession conviction). Minnesota's issuance of an identification card based on forged documents, however, does not create a reliance which invalidates White's criminal conviction. Unlike the presentations in Raley, Cox and Brady, the state of Minnesota did not affirmatively parti-cipate in the conduct which lead to the criminal violation.

DECISION

Minn. Stat. § 617.246 does not sub-stantially prohibit constitutionally protected expression and is not facially overbroad, even though it permits no defense of mistake as to age. The statute violates no due process rights, and any attempted distinction between mistake of age from mistake of identity is legally insufficient to create such a violation.

Affirmed.

Caption Cited

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Eve White a/k/a Eve Cascio for further review be, and the same is, denied.

Dated: 3/15/1991

BY THE COURT:

s/A.M. Keith

Chief Justice

GARDEBRING, J. took no part.

TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

§ 1. **Citizenship rights not to be abridged by states**

Section 1. All persons born or naturalized in the United States, and subject to the juris-diction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

617.246. **Use of minors in sexual performance prohibited**

Subdivision 1. Definitions. (a) For the purpose of this section, the terms defined in this subdivision have the meanings given them.

(b) "Minor" means any person under the age of 18.

(c) "Promote" means to produce, direct, publish, manufacture, issue, or advertise.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical repro-duction which depicts sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following if the depiction involves a minor:

(i) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

(ii) Sadomasochistic abuse, meaning flagel-lation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being

fettered, bound or otherwise physically restrained on the part of one so clothed.

(iii) Masturbation or lewd exhibitions of the genitals.

(iv) Physical contact or stimulated physical contact with the clothed or unclothed pubic area or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(f) "Work" means an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing.

Subd. 2 Use of minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Any person who violates this subdivision is guilty of felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000 for the first offense and $20,000 for a second or subsequent offense, or both.

Subd. 3. Operation or ownership of business. A person who owns or operates a business in which a work depicting a minor in a sexual performance, as defined in this section, is disseminated, and who knows the content and character of the work disseminated, is guilty of a felony and may be sentenced to imprisonment for not more than five years, or to payment of a fine of not more than $10,000 for the first offense and $20,000 for a second or subsequent offense, or both.

Subd. 4. Dissemination. A person who, knowing or with reason to know its content and character, disseminates for profit a work depicting a minor in sexual performance, as defined in this section, is guilty of a felony and may be sentenced to imprisonment for not more than five years, or to payment of a fine of not more than $10,000 for the first offense and $20,000 for a second or subsequent offense, or both.

Subd. 5. Consent, mistake. Neither consent to sexual performance by a minor or the minor's parents, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section.

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

(3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-1909

EVE WHITE a/k/a EVE CASCIO

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BY: JOHN E. DeSANTO
Assistant St. Louis County Attorney
100 North Fifth Avenue West, No. 501
Duluth, MN 55802-1298
Telephone: 218-726-2323
ATTORNEY FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-1909

EVE WHITE a/k/a EVE CASCIO

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BY: JOHN E. DeSANTO
Assistant St. Louis County Attorney
100 North Fifth Avenue West, No. 501
Duluth, MN 55802-1298
Telephone: 218-726-2323
ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

1. Is Minnesota child pornography statute, § 617.246 (1989), constitutional under the First and Fourteenth Amendments to the United States Constitution, although this statute imposed criminal liability upon Petitioner's conduct without affording Petitioner a defense based upon mistake of age of the minor employed by Petitioner to engage in a sexual performance?

2. Is Minnesota child pornography statute § 617.246 (1989), constitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, although this statute imposed criminal liability upon Petitioner for employing a minor to engage in a sexual performance when the minor used a false Minnesota identification card, fraudulently obtained from the State of Minnesota, to misrepresent her age when seeking employment from Petitioner?

TABLE OF CONTENTS

PAGE

Questions Presented . . . . . i-ii

Table of Contents iii

Table of Authorities . . . . . iv-vi

Statement of the Case 1-5

Argument Why the Writ Should Not Issue

I. The decision of the Minnesota Supreme Court upholding the constitutionality of a child pornography statute imposing criminal liability upon Petitioner regardless of her mistaken knowledge of the age of the minor employed by her is absolutely consistent with applicable decisions of this Court. . 5-11

II. No due process violation has occurred in this case as a result of Petitioner being denied a mistake of age defense, nor as a result of the State of Minnesota issue a false Minnesota identification card to the minor hired by Petitioner to engage in a sexual performance. . 11-19

Conclusion 20-22

TABLE OF AUTHORITIES

CONSTITUTION

STATE STATUTES

Minnesota Statutes Section
171.07, Subd. 3. 8

FEDERAL STATUTES

CASES

Barnes v. Glen Theatre, Inc., _____ U.S. _____ 59 LW, 4745 (June 21, 1991) 9, 11, 20

Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) 15, 16, 18

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) 6, 7, 13, 20

Osborne v. Ohio, _____ U.S. _____ 110 S.Ct. 1691 (1990) . . 6, 7, 13, 30

Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959) 15, 16, 18

State v. Fan, 445 N.W.2d 243 (Minn. App. 1989), pet. for rev. denied (Minn. October 31, 1989), cert. denied _____ U.S. _____ 110 S.Ct. 1480, 108 L.Ed.2d 617 (1990) 7, 13

State v. White, 464 N.W.2d 585 (Minn. App. 1990) . . . 5, 10, 13

U.S. v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922) 12

U.S. v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed 619 (1922) 12

U.S. v. Brady, 710 F. Supp. 290 (D. Colorado 1989) 16, 18

U.S. v. Brooks, 841 F.2d 268 (9th Cir. 1988) 12

U.S. v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943) . 12

U.S. v. Freed, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971) 12, 13

U.S. v. Hamilton, 456 F.2d 171 (3rd Cir.), cert. denied, 406 U.S. 947, 92 S.Ct. 2051, 32 L.Ed.2d 335 (1972) 12

U.S. v. Laub, 385 U.S. 475, 87 S.Ct. 547, 17 L.Ed.2d 520 (1967) 15, 16

U.S. v. Pennsylvania Chemical Corp., 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973) . . . 16-18

U.S. v. United States District Court 10

STATEMENT OF THE CASE

In this case, Petitioner, following a jury trial, was convicted of the felony of using a minor in a sexual performance. As a result of this conviction, Petitioner was placed on five years of probation and ordered to pay a $5,000 fine. The judgment of conviction was affirmed by the Minnesota Court of Appeals on December 31, 1990. On March 15, 1991, the Minnesota Supreme Court denied Petitioner's petition for review. Petitioner now seeks a writ of certiorari from this Court.

Petitioner's Statement of the Case to this Court is inaccurate at page six in that it implies that Petitioner was thorough in attempting to verify the age and identity of the nude dancers she hired

to perform at the Minneapolis, St. Paul, and Duluth, Minnesota, bookstores owned by Ferris Alexander. In the case of 17-year-old R.A.R., hired by Petitioner in the instant case, although Petitioner accepted a false Minnesota identification card identifying R.A.R. as her 26-year-old sister, Sheryl Reynolds, Petitioner remarked that R.A.R. looked younger than the age given on this identification card. (*T. 80)

Despite the facts that R.A.R. looked younger than 26 years old, had no other identification, and could not produce a social security card or number, Petitioner did virtually nothing to avoid hiring this

*T. refers to trial transcript.

underage performer. Petitioner never asked to see R.A.R.'s social security card after hiring R.A.R. (T. 80, 434) Petitioner simply had R.A.R. repeat the information on the false identification card, compared R.A.R.'s signature on a W-4 form with her signature on the false identification card, and later, accepted a false social security number from R.A.R. over the telephone. (T. 435, 80)

Petitioner's Statement of the Case to this Court is incomplete in that it fails to inform this Court that Petitioner testified at her trial that she was really not concerned about the true identity of the performers she hired to engage in sexual performances. Petitioner was frequently unaware of the true name

of any of the performers she hired. Ninety percent of the girls hired by Petitioner used false names. (T. 464)

Petitioner's Statement of the Case to this Court also fails to inform this Court that another dancer at the Wabasha Bookstore in Duluth, Minnesota, and a clerk at this store, testified that there is no way they believed that R.A.R. was 26 years old. Sandra Keinbaum testified that when she saw R.A.R. during the first week of May, 1989 there was no way she would have thought R.A.R. was 26 years old. (T. 239) Cliff Bergstrom, a clerk, testified that R.A.R. looked a lot younger than 26 and he would not have believed the false Minnesota Identification Card

indicating R.A.R. was 26 years old if he had been shown the card. (T. 287)

ARGUMENT

I.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHOLDING THE CONSTITUTIONALITY OF A CHILD PORNOGRAPHY STATUTE IMPOSING CRIMINAL LIABILITY UPON PETITIONER REGARDLESS OF HER MISTAKEN KNOWLEDGE OF THE AGE OF THE MINOR EMPLOYED BY HER IS ABSOLUTELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

Contrary to the argument in support of Petitioner's petition for writ of certiorari to this Court, the decision of the Minnesota Court of Appeals in State v. White, 464 N.W.2d 585 (Minn. App. 1990) and the decision of the Minnesota Supreme Court on March 15, 1991 denying further review of this case are absolutely consistent with decisions of this Court.

In fact, if the Minnesota appellate courts had declared Minnesota Statute § 617.246, Subd. 2 and Subd. 5 unconstitutional under the First and Fourteenth Amendments in the instant case, the Minnesota courts would have had to ignore the constitutional mandates of this Court in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and in Osborne v. Ohio, _____ U.S. _____ 110 S.Ct. 1691 (1990).

Moreover, this Court has already denied certiorari after the Minnesota appellate courts previously upheld the constitutionality of Minnesota Statute § 617.246 in State v. Fan, 445 N.W.2d 243 (Minn. App. 1989), pet. for rev. denied (Minn. October 31, 1989), cert. denied.

_____ U.S. _____ 110 S.Ct. 1480, 108 L.Ed.2d 617 (1990).

The obscenity cases cited by Petitioner are not applicable to this child pornography case. Given the extremely important State interest in protecting the victims of child pornography, the constitutionality of statutes enacted "to eradicate child pornography," Osborne, 110 S.Ct. at 1700, like Minnesota Statutes § 617.246 need not be reviewed again by this Court. Obscenity is irrelevant to child pornography which is not protected by the First Amendment. Ferber, supra.

Respondent seriously challenges the characterization of Petitioner as a "conscientious promotor of First Amendment

activities who conscientiously attempts to comply with the law." Petition for writ of certiorari at page 16. The evidence in the instant case contradicts that assertion. Although Petitioner personally believed R.A.R. was younger than the 26 years indicated on her I.D. card, and although R.A.R. had no other forms of identification and could not even produce a social security card or number during her employment interview by Petitioner, 17-year-old R.A.R. was hired by Petitioner to engage in pornographic sexual performances. Moreover, the record in the instant case clearly indicates that Petitioner cared little about the true identity of the girls she hired as nude dancers.

Also, this is not a case involving "the producer of a book, magazine, or motion picture film," as represented at page eight of the petition for certiorari. Instead, this is a case involving the hiring of a minor to engage in live entertainment at the Wabasha Bookstore in Duluth, Minnesota, consisting of nude dance performances through glass panels to customers sitting in booths and inserting coins into a timing mechanism permitting the customers to observe the dancers like R.A.R. (T. 40-45)

In the most recent pronouncement by this Court in Barnes v. Glen Theatre, Inc., _____ U.S. _____ 59 LW 4745 (June 21, 1991) an Indiana statute prohibiting completely nude dancing by

adult females in a bookstore circumstance virtually identical to that in the instant case was upheld as constitutional over a First Amendment challenge. Certainly, the Minnesota statute challenged on First Amendment grounds in the instant case, which prohibits the use of minors in sexual performances, much more readily passes constitutional muster.

Finally, as indicated by the Minnesota Court of Appeals in White, 464 N.W.2d at 589, the Minnesota statute in question here affects expressive conduct, rather than speech, and it contains a scienter requirement for the content of the performance. Hence, U.S. v. United States District Court, 858 F.2d (9th Cir.

1988) does not conflict with the instant case.

Moreover, under Barnes v. Glen Theatre, Inc., 59 LW 4745, Petitioner's claim that nude dancing is a form of constitutionally protected expression is no longer correct. Plainly and simply, there is no need for this Court to grant certiorari to review the instant case on First Amendment grounds.

II.

NO DUE PROCESS VIOLATION HAS OCCURRED IN THIS CASE AS A RESULT OF PETITIONER BEING DENIED A MISTAKE OF AGE DEFENSE, NOR AS A RESULT OF THE STATE OF MINNESOTA ISSUING A FALSE MINNESOTA IDENTIFICATION CARD TO THE MINOR HIRED BY PETITIONER TO ENGAGE IN A SEXUAL PERFORMANCE.

First, Petitioner is absolutely incorrect that "this Court has never

upheld the imposition of strict liability for a serious felony offense like that created by Section 617.246." Petition at page 19. Both this Court and United States Courts of Appeals have upheld the constitutionality of strict liability felony offenses. See U.S. v. Freed, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); U.S. v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943); U.S. v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed 619 (1922); U.S. v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922); U.S. v. Brooks, 841 F.2d 268 (9th Cir. 1988); and U.S. v. Hamilton, 456 F.2d 171 (3rd Cir.), cert. denied, 406 U.S. 947, 92 S.Ct. 2051, 32 L.Ed.2d 335 (1972).

Moreover, the Minnesota Statute at issue in the instant case is not a pure "strict liability" statute. Section 617.246 does contain a scienter requirement for the content of the performance for which the minor is employed. State v. White, 464 N.W.2d at 589; State v. Fan, 445 N.W.2d at 247.

Petitioner, in footnote #7 of her petition to this Court, attempts to distinguish Freed on the grounds that Freed upheld a strict liability regulatory statute enacted in the interest of the public safety, health and welfare. Certainly, as indicated by this Court also in Ferber and Osborne, statutes like Section 617.246 are also enacted in the

interest of public health, welfare, and safety of our children.

In addition, Petitioner's due process claim that her conviction must be reversed because "the State of Minnesota was an active and crucial participant," (petition at page 23) in R.A.R.'s misrepresentation of age to Petitioner is patently false. The evidence clearly indicates that the State of Minnesota did not affirmatively or actively participate with R.A.R. in her misrepresentation of age to Petitioner.

After being defrauded by R.A.R., a clerk at the Department of Public Safety of the State of Minnesota simply issued the false Minnesota Identification Card to R.A.R. as required by Minnesota Statutes § 171.07, Subd. 3. Neither this

clerk, nor anyone else employed by the State of Minnesota, then instructed R.A.R. to go use the Minnesota Identification Card to get employment in the pornography industry. Neither this clerk, nor anyone else employed by the State of Minnesota, contacted Petitioner and told her to hire R.A.R. to work in the Ferris Alexander bookstores in Minneapolis, St. Paul, and Duluth. Plainly and simply, the State of Minnesota was not "an active and crucial participant" in R.A.R.'s misrepresentation.

Petitioner's cited authorities of Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), U.S. v. Laub, 385 U.S.

475, 87 S.Ct. 547, 17 L.Ed.2d 520 (1967), U.S. v. Pennsylvania Chemical Corp., 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973), and U.S. v. Brady, 710 F. Supp. 290 (D. Colorado 1989) are easily distinguishable from the instant case.

Raley, Cox, and Brady, all involved instances where someone in authority in government erroneously instructed the accused about the law. The accused persons then acted in accordance with the erroneous instructions only to be prosecuted and convicted by the government for these actions. It is obvious that it violates due process to convict the defendants of crimes in these cases.

In Laub, this Court simply affirmed a dismissal of an indictment charging an

immigration law violation which did not actually exist in the statute. Finally, in U.S. v. Pennsylvania Chemical Corp., this Court prevented the government from proceeding with a prosecution under a statute when the defendant corporation relied on an administrative interpretation of the statute published by the U.S. Army Corp of Engineers permitting performance of the charged acts.

Plainly and simply, Petitioner did not employ 17-year-old R.A.R. to engage in a sexual performance in the instant case as a result of any instructions from anyone in authority for the government only to be prosecuted for doing so.

It is instructive to note that Petitioner's argument on this issue

contradicts itself at page 24 of the petition. Here, even Petitioner concedes that when the State of Minnesota issued R.A.R. the false identification card, "it did so plainly for the purpose of permitting her to establish her identity and age for all lawful purposes." (emphasis supplied) Clearly, when 17-year-old R.A.R. used this false I.D. card to gain employment from Petitioner as a nude dancer, R.A.R. was not using this fraudulently obtained I.D. card for a lawful purpose. Petitioner could not lawfully hire performers under 18 years of age for the sexual performances at her bookstores.

Unlike the situations in Raley, Cox, Pennsylvania Chemical Corp., and Brady,

in the instant case, there is absolutely no fundamental unfairness or injustice in prosecuting, convicting, and punishing Petitioner for hiring a minor to engage in sexual performances for the pornography industry. Seventeen-year-old R.A.R. could have gotten her false identification misrepresenting her age from illegal sources, as well as the State of Minnesota. By defrauding the State of Minnesota and obtaining her false identification from the State, R.A.R. did not preclude her protection, as a minor, from the pornography industry under Minnesota Statutes § 617.246.

CONCLUSION

Neither the First nor Fourteenth Amendments to the United States Constitution were violated by the successful prosecution of Petitioner for violating Minnesota Statutes § 617.246, which was enacted to combat child pornography.

The decisions of the Minnesota Court of Appeals and Minnesota Supreme Court to uphold the constitutionality of Minnesota Statutes § 617.246 against First Amendment and Due Process claims are absolutely consistent with the decisions of this Court in Ferber, Osborne, and most recently, in Barnes. In fact, because the conduct regulated by the Minnesota statute in question here is not speech, this

statute is arguably not even subject to First Amendment scrutiny at all. Barnes, 59 LW at 4748-4751 (J. Scalia concurring).

By enacting Minnesota Statute § 617.246, the Minnesota legislature constitutionally exercised the State's traditional police power to protect the public health, safety, and morals. This child pornography statute furthers the compelling government interest in protecting the physical and psychological well-being of the children of this nation. To accomplish these ends, this statute properly places a heavy burden on persons, like Petitioner, who hire individuals to perform in sexual performances to make sure they do not hire minor children.

All adult nude dancing is not suppressed by this statute as Petitioner

claims. Nude dancing is no longer constitutionally protected, per se, anyway.

For all of the foregoing reasons, Respondent respectfully requests that the writ of certiorari to review the decisions of the Minnesota appellate courts not issue. There is absolutely no special and important reason why this case should be reviewed by the United States Supreme Court.

Dated: July 11, 1991.

Respectfully submitted,

ALAN L. MITCHELL
ST. LOUIS COUNTY ATTORNEY

BY:

JOHN E. DeSANTO
Assistant St. Louis County Attorney
100 North Fifth Avenue West, #501
Duluth, MN 55802-1298
Telephone: 218-726-2323